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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-819

KARL SCHWARTZBAUM,

Petitioner,

—vs.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	3
Questions Presented for Review	3
Constitutional, Statutory and Regulatory Provisions Involved	4
Statement of the Case	5
A. The Charge and its Context	5
B. The Trial Proof	6
C. The Newly Discovered Evidence	10
D. The Value of the Newly Discovered Evidence	13
Reasons for Granting the Writ	14
CONCLUSION	26

TABLE OF AUTHORITIES

Cases:

Berger v. *United States*, 295 U.S. 78 (1974) 25

Communist Party v. *Subversive Activities Board*, 351 U.S. 115 (1956) 16

Dunn v. *United States*, 245 F.2d 407 (6th Cir. 1957) 25

James v. *United States*, 175 F.2d 769 (5th Cir. 1949) 25

Larrison v. *United States*, 24 F.2d 82 (9th Cir. 1928) 18

Lyda v. *United States*, 321 F.2d 799 (9th Cir. 1963) 17

Mesarosh v. *United States*, 352 U.S. 1 (1956) .. 16, 17, 19

PAGE

Napue v. *Illinois*, 360 U.S. 264 (1959) 16, 18, 25

People v. *Savvides*, 1 N.Y.2d 554 (1956) 19-20

Simon v. *United States*, 123 F.2d 80 (4th Cir. 1941) 17

Smith v. *United States*, 259 F.2d 125 (9th Cir. 1958) 25

United States v. *Anderson*, 509 F.2d 312 (D.C. Cir. 1974), *cert. den.*, 420 U.S. 991 (1975) 18

United States v. *Briola*, 465 F.2d 1018 (10th Cir.), *cert. den.*, 409 U.S. 1108 (1973) 18

United States v. *Curran*, 465 F.2d 260 (9th Cir. 1972) 18

United States v. *Derosier*, 229 F.2d 599 (3d Cir. 1956) 25

United States v. *Johnson*, 487 F.2d 1278 (4th Cir. 1973) 18

United States v. *Keogh*, 391 F.2d 138 (2d Cir. 1968) 25

United States v. *Kubacki*, 237 F. Supp. 638 (E.D. Pa. 1965) 17

United States v. *Meyers*, 484 F.2d 113 (3d Cir. 1973) 18

United States v. *Miller*, 411 F.2d 825 (2d Cir. 1969) 18

United States v. *Provo*, 215 F.2d 531 (2d Cir. 1954) 17

United States v. *Schwartzbaum*, — F.2d — (2d Cir. November 7, 1975) 2, 1a

United States v. *Schwartzbaum*, — F. Supp. — (S.D. N.Y. June 24, 1974) 2, 36a

United States v. *Schwartzbaum*, — F. Supp. — (S.D. N.Y. June 5, 1975) 3, 55a

United States v. *Segelman*, 83 F. Supp. 890 (W.D. Pa. 1949) 17

United States v. *Smith*, 433 F.2d 149 (5th Cir. 1970) 18

PAGE

United States v. *Stofsky, et al.*, — F.2d — (2d Cir. November 7, 1975) 2, 18, 13a

United States v. *Stofsky, et al.*, — F. Supp. — (S.D. N.Y. June 12, 1974) 3, 37a

United States v. *Stofsky, et al.*, — F. Supp. — (S.D. N.Y. June 4, 1975) 3, 57a

United States v. *Strauss*, 443 F.2d 986 (1st Cir.), *cert. den.*, 404 U.S. 851 (1971) 18

United States v. *Zbrowski*, 271 F.2d 661 (2d Cir. 1959) 25

United States Constitution:

Fifth Amendment 4, 63a

United States Code:

28 U.S.C. § 1254(1) 3

29 U.S.C. § 186(a) 4, 63a

29 U.S.C. § 186(c) 13, 63a

Rules:

Federal Rules of Criminal Procedure, Rule 33 .. 4, 21, 64a

Rules of Evidence for the United States Courts and Magistrates, Rule 608(b) 15

Other Authorities:

Wigmore on Evidence, Volume 3-A, § 957 15-16

Wigmore on Evidence, Volume 3-A, §§ 993-995 18

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Karl Schwartzbaum, prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit, entered on November 7, 1975, which affirmed a judgment of conviction previously entered against him in the United States District Court for the Southern District of New York.

Opinions Below

Petitioner, a manufacturer, was tried alone upon the charge of unlawfully making payments to union representatives. In a separate trial, certain union representatives were convicted of having unlawfully received payments from manufacturers, one of which was the petitioner. Both cases were tried in sequence before the same

district judge, and resulted in convictions. Thereafter, motions for a new trial, based upon newly discovered evidence (Rule 33, F. R. Cr. P.) were filed in both cases. In each case the motion was based upon the discovery of perjury on the part of the chief prosecution witness. Although the district judge denied the motions in separate opinions, those opinions were cross-referenced to each other. The same pattern was followed with respect to a renewal of the new trial motions, based upon the discovery of additional evidence. In the Court of Appeals, the two cases were consolidated for argument. Although the Court of Appeals affirmed the convictions in separate opinions, those opinions were cross-referenced to each other.

In view of the interrelationship of the two cases, *United States* v. *Schwartzbaum* and *United States* v. *Stofsky, et al.*, we have reproduced in the appendix hereto, all relevant opinions in both cases.

The opinion of the Court of Appeals, affirming the judgment of conviction herein, *United States* v. *Schwartzbaum*, — F.2d — (November 7, 1975), is contained in Appendix A, at 1a-12a.* The opinion of the Court of Appeals, affirming the judgment of conviction in *United States* v. *Stofsky*, — F.2d — (November 7, 1975), is contained in Appendix B, hereto, at 13a-35a.

The endorsed order of the district court denying the first new trial motion of petitioner, *United States* v. *Schwartzbaum*, — F. Supp. — (June 24, 1974), is re-

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* The Appendix to this petition is bound separately due to its size. It is cited herein as follows: "-a". References preceded by "A." are to the appellant's appendix filed in the Court of Appeals with respect to the instant appeal. References preceded by "Tr." are to the trial transcript, which was annexed to the appellant's appendix, but which retained its original pagination.

produced in Appendix C, hereto, at 36a. The opinion of the district court denying the first new trial motion in *United States* v. *Stofsky*, — F. Supp. — (June 12, 1974), is reproduced in Appendix D, hereto, at 37a.

The endorsed order of the district court denying the second new trial motion of petitioner, *United States* v. *Schwartzbaum*, — F. Supp. — (June 5, 1975), is reproduced in Appendix E, hereto, at 55a. The opinion of the district court denying the second new trial motion in *United States* v. *Stofsky*, — F. Supp. — (June 4, 1975), is reproduced as Appendix F, hereto, at 57a.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was filed on November 7, 1975 (1a).

Questions Presented for Review

Petitioner moved in the trial court for a new trial based upon newly discovered evidence (Rule 33, F.R. Cr.P.), and for a hearing in support thereof. The government admitted and the trial court found that the government's principal and indispensible trial witness perjured himself with respect to the extent of his own misconduct and with respect to matters which, if answered truthfully, would have led the defense to uncover the witness's perjury.

1. Did due process of law and the proper administration of justice require that the motion for a new trial be granted upon the established perjury of the witness?

2. Where it is clear that a government witness has perjured himself with respect to facts relating to his

credibility and with respect to facts relating to the accuracy of his memory, is the defense bound to establish that such newly discovered evidence "probably" would have produced a different verdict or should a new trial be granted if such evidence "might" produce a different verdict?

3. Did the lower courts erroneously conclude that the defense failure to discover the perjury at the time of trial was the result of a lack of due diligence? In this respect, and under the facts of this case, was it improper for the lower courts to hold the defense to a higher standard of perception than that applied to the government's failure to uncover and disclose the same perjury?

4. Was the defense, at least, entitled to an evidentiary hearing at which it would have an opportunity to examine the government witness to determine the extent to which his admitted perjury was motivated by a desire to hide the falsity or inaccuracy of that part of his testimony which inculpated petitioner?

Constitutional, Statutory and Regulatory Provisions Involved

This case involves the Due Process Clause of the Fifth Amendment.

Petitioner was convicted of violating 29 U.S.C. § 186 (a).

A motion for a new trial was brought pursuant to F. R. Cr. P., Rule 33.

Each of these constitutional, statutory and regulatory provisions is reproduced in Appendix G, hereto, at 60a.

Statement of the Case

A. The Charge and its Context

The fur garment industry in New York City is composed of some six hundred union manufacturers and four hundred non-union manufacturers. The union shops are members of a trade organization called the Associated Fur Manufacturers [hereinafter, "The Association"]. The Association employs several individuals called "labor adjusters" who have as their function the supervision of conditions at the shop level and who represent the manufacturers in connection with the day to day problems that arise with the workers' organization, the Furrier's Joint Council [hereinafter, "The Union"].

For many years, until September, 1970, Jack Glasser the Government's principal witness, was a labor adjuster with 115 shops under his supervision. One of Glasser's shops was K. J. Schwartzbaum, Inc., owned by petitioner (3a-4a).

At the shop level, the Union is represented by a "business agent". During the initial period covered by the indictment herein (late 1969), one of the business agents, was Harry Jaffee, and one of the shops to which he was assigned was the Schwartzbaum firm (5a).

A contract between the Association and the Union governed the conditions of employment for Union members and related matters. Under the contract, whenever a business agent visited a Union shop to investigate conditions there, he was required to be accompanied by a representative of the Association, normally the labor adjuster (3a; Tr. 48-9, 95-6, 261, 266; Gov. Exhibit 2, Article 18, § 4).

The Union contract contains a provision which prohibits all members of the Association from sub-contracting work to non-union shops. Another provision prohibits members from importing fur garments from outside the United States. Under the contract, if an employer violated either of these provisions, he was subjected to the possibility of a fine or other labor action (3a). It was the function of the labor adjuster to seek the best possible disposition of complaints made against manufacturers. At hearings, he would represent the manufacturers' interests. If complaints reached the hearing stage, the Union's interest would be represented by Charles Hoff, Assistant Manager of the Union (3a-4a). There was no evidence in this case that petitioner ever met or spoke with Hoff. Nevertheless, the indictment charged that, during 1969 and 1970, petitioner made a total of four payments, of $150.00 each, to Hoff for the purpose of inducing Union non-action with regard to the Schwartzbaum firm in relation to violations of the above noted contract prohibitions (1a, 4a). The labor adjuster, Glasser, testified that he was the conduit for those payments (4a).

B. The Trial Proof

The trial proof established that, in 1968, petitioner found it difficult to compete in the fur industry and decided to reduce his costs by sending some of his work to non-union shops for the creation of fur garments, and by importing finished garments, all in violation of the Union contract. Payments for such non-union work were accomplished by means of a private checking account which enabled the firm to bypass the books and records that would normally be available for Union inspection (4a). There was no claim at trial that this process involved any element of criminality or tax avoidance (4a).

In July, 1970, prior to any investigation by the government, officials of the Association conducted an investigation of Glasser. Although he denied participation in or awareness of payments to Union officials in behalf of manufacturers, he was discharged from his employment (4a, 18a). At petitioner's trial, Glasser attributed the commencement of his troubles to the fact that one of the manufacturers "turned *me* in" (Tr. 110).

Almost two years later, in April, 1972, Glasser was questioned by a Federal Strike Force attorney in the Southern District of New York, and denied any knowledge or participation in a scheme to pay Union officials (Tr. 94, 166-7).

Thereafter, *transactional* immunity was conferred upon Glasser, and he commenced to allege that he had been a go-between for the transfers of payments from six manufacturers (including petitioner) to Union officials for the purpose of having Union officials disregard contract violations. He admitted to keeping for himself up to fifty percent of such payments (17a, fn. 5).

An indictment was subsequently returned against four Union officials (*United States* v. *Stofsky, et al.*) and another indictment was returned against four manufacturers, including petitioner. Glasser testified at the *Stofsky* trial, which ended on February 28, 1974, one month prior to the commencement of petioner's trial.*

Glasser's basic story was that, during the period from April, 1967 to December, 1968, he was independently approached by six different manufacturers who wished to engage in subcontracting or importation, but who wanted to avoid any difficulties which might otherwise

* Petitioner was granted a severance from the other three manufacturers since there was no proof that the activity alleged against each of them was connected.

result if they did so. Periodic payments were, allegedly, made to Glasser, who would then pay a part over to union officials, and keep the balance for himself.

According to Glasser, his first contact with petitioner concerning such an arrangement was in May, 1968. The opinion of the Court of Appeals recounts Glasser's version of subsequent events as follows:

> "As recounted by Glasser, Schwartzbaum told him at that meeting that he had been contracting and asked whether there was any way to secure the cooperation of the Union. Glasser, who had previously relayed money from other manufacturers seeking absolution for contracting violations, spoke the following day to Charles Hoff, assistant manager of the Union. Hoff consented to a similar arrangement for Schwartzbaum whereupon Glasser returned to KJS and told the appellant, "I have the okay from Charlie Hoff." Glasser added that over the next two years he received six installments of $300 each from Schwartzbaum and that each time he forwarded one half of that sum to Hoff, identifying the appellant as its source. * * * "

At petitioner's trial, Glasser adamantly insisted on direct and cross-examination that the firms which he identified were the only firms with which he had such dealings. Thus, on direct examination by the government, Glasser testified as follows:

> "Q. Mr. Glasser, you mentioned that in addition to the payments from Mr. Schwartzbaum which you passed on to Mr. Hoff, you had also transmitted payments to Hoff from I believe two other firms, Sherman Brothers and Chateau. Have you ever accepted payments from any other fur

manufacturers which you transmitted to any official of the furrier's union? A. Yes I did.

"Q. What firms were those? A. There was a firm called Corrina Furs, there was Breslin, Baker there is one other now and I just can't remember his name. I just can't recall. There was one other. *There were five firms altogether*" (Tr. 80) [Emphasis added].

Similarly on cross-examination, Glasser adhered to these contentions (Tr. 84-5).

Although Glasser claimed that he turned fifty percent of the payments that were made to him over to one or the other of the Union officials, he vaccilated throughout petitioner's trial on the question of whether he had told the manufacturers, particularly petitioner, that he was making such payments to Union officials.*

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* At Tr. 191-3, upon cross-examination, Glasser testified as follows:

"Q. Mr. Glasser, you testified yesterday that you actually told Mr. Schwartzbaum the name of the Union official who gave the okay? A. I don't know if I did tell it to him. I don't know.

* * * * *

"Q. Let's find out about this respect: did you ever testify at any time, under oath, that you told Mr. Schwartzbaum the name of the Union official? A. I don't know if I did. I cannot recall that I testified to it or that I didn't.

"Q. And today you are not even sure as to whether or not you had ever mentioned him? A. To Mr. Schwartzbaum specifically, Mr. Hoff?

"Q. Yes. A. No, I am not sure that I did.

"Q. And it could be that you didn't tell it to him? A. Possibly that I didn't tell it to him, that it was Mr. Hoff, yes."

See also: Tr. 193-201. On re-direct examination, government counsel was only able to rehabilitate Glasser's testimony to the following extent: "I came back to Mr. Schwartzbaum and I said, I have had a conversation with Mr. Hoff. He has said okay. You can go ahead and do it." (Tr. 229). Notably, no mention of payment to Hoff was made.

At the trial, the government sought to corroborate Glasser's testimony by reference to an allegedly similar act, not charged in the indictment. Harry Jaffee, a business agent of the Union, testified that in October or November, 1969, Glasser gave him $50 and told him to ignore anything he might see at the Schwartzbaum shop. Jaffee had no knowledge as to whether Schwartzbaum was aware of the payment. (5a; Tr. 267-293).

The government additionally sought to corroborate Glasser's testimony by virtue of an alleged admission made by petitioner to a loan officer of Chase Manhattan Bank. At or about the time that the indictment was filed against petitioner, the matter received some newspaper publicity. The Schwartzbaum firm had a $400,000 line of credit with the Bank. Albert Chambers, the loan officer, testified that during a meeting with petitioner, petitioner mentioned the indictment ". . . and that he had made payments to Union officials." (5a). In view of various patently and concededly erroneous aspects of Chambers' testimony, it was the defense position that petitioner had only been recounting the charges of the indictment to Chambers, and that Chambers erroneously interpreted those comments as admissions.

C. The Newly Discovered Evidence

At petitioner's trial, as noted *supra*, Glasser claimed that he had received payments from only five other manufacturers and that his share of those payments aggregated a total of $5,043.00 (A. 49-50).

At the prior trial of the Union officials in *Stofsky*, counsel for those defendants had subpoenaed bank records which led to the disclosure that Glasser had financial assets in excess of $100,000.00. Unfortunately, the bank's response to the subpoenas had not included those records

which would have revealed to counsel that, during the three and a half year period covered by this indictment, Glasser had made large and frequent *cash* deposits to his various bank accounts. Glasser explained at the *Stofsky* trial that the bulk of his resources were derived from an inheritance which had been received by his wife a number of years prior to the events involved herein. That claim, now known to be false, was corroborated by Glasser's wife, who was called as a Government witness (20a). This explanation was not inconsistent with the available bank records. Thus, no significant issue was made at petitioner's trial with respect to Glasser's bank accounts. The issue had been a dead end at the *Stofsky* case and there was no reason to believe it would be otherwise in petitioner's case.

Following petitioner's trial, petitioner's counsel became aware of the existence of additional bank records which revealed the cash nature of Glasser's bank deposits. Those records established that, during the three and a half year period covered by the indictment, Glasser's total *cash* deposits amounted to at least $56,701.05. That disclosure prompted both petitioner and the defendants in the *Stofsky* case to make a motion for a new trial grounded upon newly discovered evidence. In preparing its response to the motions, government counsel interviewed Glasser and his wife. At first they claimed that the cash deposits resulted from the sale of Mrs. Glasser's jewelry (A. 116-7); however, Glasser eventually admitted that at least one-half of the deposits were the proceeds of payments made by other manufacturers and the balance was from legitimate transactions. He produced no documentation to support the allegedly legitimate portion of those funds. The government incorporated all of Glasser's admissions and other claims into a reply affidavit *executed by government counsel.* The government did not include in its reply any affidavit executed by Glasser (A. 77-87; 116-7).

Petitioner's motion for a new trial was denied by the trial court (30a), as was a motion for a new trial made in behalf of the Union officials (37a).

After petitioner's brief was filed in the Court of Appeals, the government provided the defense with additional information in which it was disclosed that it had obtained copies of other Glasser financial records from several banking institutions, and had concluded that Glasser's most recent version, which alleged that half of his savings were legitimate, was not correct.

By the government's own admission (A. 198) and statistics (A. 211-222), Glasser's *known* deposits from unexplained sources during the period of 1962-1963 were as follows:

Cash	$ 91,154.11
Check	23,713.89
Undetermined	42,820.83
TOTAL	$157,688.83

At the trial, Glasser had testified that he had received a total of $14,000.00 from five manufacturers during the period of 1967-1969, and that he had given most of it to Union officials, retaining only $5,043.00 for himself (Tr. 69-93; A. 49-50). In contrast, his *known* unexplained bank deposits for the period 1967-1970, were as follows:

	Cash	*Checks*	*Undetermined*	*Total*
1967-9	$57,089.05	$6,481.89	$3,432.47	$65,723.51
1970	14,200.00	2,848.23		17,048.23
			TOTAL	$84,71.74

Based upon these additional revelations, petitioner and the defendants in the *Stofsky* case renewed their new trial motions in the district court. The motions were, again, denied (55a, 57a).

D. The Value of the Newly Discovered Evidence.

At trial, the government had a three-fold burden of proof. It had to establish: (1) that petitioner made payment to Glasser; (2) that petitioner intended that Glasser pay over all or part of those funds to Union officials; and (3) that Glasser actually made the payments in question to a Union official. Indeed, the Trial Court charged the jury that they had to find the existence of each of these facts beyond a reasonable doubt before they could convict petitioner (Tr. 424). Thus, in assessing the reliability of Glasser's recollection and the truthfulness of his testimony, the jury was confronted with five possibilities, only the last of which would have justified a verdict of guilt:

1. Petitioner made no payments to Glasser;

2. Petitioner made payments to Glasser under the impression that he was stifling the self-policing function of the *manufacturers'* organization and that the money was, in fact, being kept by Glasser or being passed on to Glasser's superiors within that organization *;

3. Petitioner made payments to Glasser with the impression set forth under possibility #2, but unbeknownst to petitioner, Glasser was distributing some of this money to Union officials;

4. Petitioner was making payments to Glasser under the impression that he was distributing some of the money to Union officials, but Glasser, in fact, kept all the money for himself;

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* It was certainly not within the interest of the other members of the trade Association to have some firms undercutting them on overhead. Payments made to prevent action by the trade Association would not be violative of 29 U.S.C. § 186(c), which is concerned solely with payments to union representatives.

5. Petitioner made the payments to Glasser under the impression that Glasser was distributing the money to Union officials and Glasser did, in fact, distribute some of the money to Union officials.

Glasser's large deposits, if known to the defense at the time of trial, would have provided solid evidence for the defense contention that any monies received by Glasser had been kept by him rather than shared with Union representatives. Moreover, if it had been known to the defense at the time of trial that Glasser was receiving payments during this period from perhaps one hundred or more manufacturers, rather than merely the six claimed at trial, then Glasser's alleged recollection of having told petitioner that money was being paid to Union officials, would have been severely undermined. As it was, Glasser's trial testimony vaccilated on the issue of whether he had actually informed petitioner that payments were made to the Union official (Hoff) in question. (*Supra*, p. 9).

Reasons for Granting the Writ

The instant case presents several important questions relating to the due process rights of convicted defendants and the proper administration of justice in the Federal Courts. The government has conceded, and the District Court and Court of Appeals have found, that an indispensable prosecution witness perjured himself on direct and cross-examination. The perjury related to the scope of his own criminal misconduct and to defense lines of inquiry which would have uncovered that conduct if the witness had responded truthfully.

Notwithstanding these findings, the motion for a new trial was denied without giving the defense any opportunity to examine the witness in question at an evidentiary hearing. The Court of Appeals has offered the fol-

lowing reasons as justification for the denial of the motion without a hearing:

(1) The demonstrated perjury was not as to the guilt or innocence of the petitioner (9a-10a);

(2) The new standard in the Second Circuit for the grant of a new trial on the ground of newly discovered evidence of perjury is whether the evidence is "of such a nature that it would *probably* produce a different verdict in the event of a new trial", and the Court found that the evidence herein does not rise to that standard (10a);

(3) It has not been demonstrated that petitioner's trial counsel, by the exercise of due diligence, would not have uncovered the perjury at the time of trial (8a-9a).

Petitioner respectfully submits that these findings are not supported by the evidence and that the legal principles applied by the Court of Appeals are in conflict with principles enunciated by other circuits. Since such issues are likely to recur in other cases, this Court should review the holding of the Court of Appeals not only for the purpose of doing justice to petitioner, but also for the purpose of providing the lower Federal courts with guidance.

I

It is clear that specific instances of conduc of a witness, even though not the subject of conviction, are proper subjects of cross-examination "if clearly probative of truthfulness or untruthfulness", *Rules of Evidence for the United States Courts and Magistrates*, Rule 608(b). *A fortiori*, this would be the case where, as here, the witness, after trial, has admitted his perjuries to government counsel, who vouched for his credibility, and where his perjury concerned the course of conduct under litigation. As stated in *Wigmore on Evidence*, Volume 3-A, § 957:

> "*Willingness to Swear Falsely.* A willingness to swear falsely is beyond any question admissible as negativing the presence of that sense of moral duty to speak truly which is at the foundation of the theory of testimonial evidence."

In *Napue* v. *Illinois*, 360 U.S. 264 (1959), this Court held:

> "The jury's estimate of the truthfulness and reliability of the government witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." 360 U.S. at 269.

It has been widely recognized that cross-examination as to the "trait of veracity" and as to "a propensity to disregard the obligation of an oath" is always material to the trial of a criminal case, unlike other types of impeachment which go merely to the general character of a witness.* Indeed, this Court has held that previously undisclosed evidence of perjury by a government witness was so material to the integrity of the fact finding process that a new trial was required, even where there was no evidence of suppression by the prosecution, *Mesarosh* v. *United States*, 352 U.S. 1 (1956); *Communist Party* v. *Subversive Activities Board*, 351 U.S. 115 (1956).

In *Mesarosh*, evidence of incidents of suspected perjury by the government witness was discovered after the trial and conviction of the defendant. All but one of the incidents of suspected perjury by the government witness had occurred *after* the trial, and the one pre-trial example of perjury had occurred in a State court proceeding of which the government concededly had no knowledge at the time of trial. Nevertheless, it was held that a new trial was required in view of the fact that the confessed perjuror was a government informer and professional

witness. Under such circumstances, "the integrity of a criminal trial in the Federal courts" is involved (352 U.S. at 3). We submit there is no distinction of substance between Glasser and the witness in *Mesarosh*. By its grant of transactional immunity to him, and by its use of him to secure indictments against a substantial number of individuals, the government has vouched for Glasser to an extent substantially beyond that normally accorded to a trial witness. That Glasser may have deceived the government does not diminish the pollution which he introduced into the fact finding process, but rather intensifies it.

As already noted, the newly discovered evidence goes beyond the issue of Glasser's willingness to tell the truth. It goes directly to the substance of his testimony. Was Glasser capable of recalling what he had told petitioner, i.e., capable of distinguishing his dealings with numerous other manufacturers from his dealings with petitioner? If the cash receipts which he banked were the results of dealings with other manufacturers, as is now admitted, then simple mathematics indicates that he was probably dealing with eighty or one hundred such manufacturers. At trial, the jury was aware of his dealings with only six manufacturers, since he perjured himself in limiting the total to that number.

Glasser's memory problems at trial were attributed merely to the passage of time. Nevertheless, he eventually alleged that he had specific recollections concerning his conversations with petitioner. If the newly discovered evidence would have been available to the defense at trial, it would clearly have supported the defense contention that Glasser could not reliably recall what he had told

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* *United States* v. *Provo*, 215 F.2d 531, 537 (2d Cir., 1954); *Simon* v. *United States*, 123 F.2d 80, 85 (4th Cir., 1941); *United States* v. *Kubacki*, 237 F. Supp. 638 (S.D. Pa., 1965); *Lyda* v. *United States*, 321 F.2d 788, 793 (9th Cir., 1963); *United States* v. *Segelman*, 83 F. Supp. 890, 893 (W.D. Pa., 1949).

to petitioner or whether Glasser had kept all of petitioner's money for himself. The basis and reliability of a witness's ability to recall goes directly to the substance of his testimony. *Napue* v. *Illinois, supra.* Since, in the present case, it was the only line of defense available, it would certainly have been exploited to the fullest extent. *See*: *Wigmore on Evidence*, Volume 3-A, §§ 993-995.

As stated by the Second Circuit, itself, in *United States* v. *Miller*, 411 F.2d 825, 832 (2d Cir., 1969), "there was a significant chance that this added item, developed by skilled counsel . . ., could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction."

II

In the related appeal, *United States* v. *Stofsky* (13a, *et seq.*), the Court of Appeals repudiated the so-called *Larrison* test which requires that, in instances of demonstrated perjury, a new trial will be granted if, without the false testimony, the jury "*might* have reached a different conclusion." *Larrison* v. *United States*, 24 F.2d 82, 87 (7th Cir., 1928). The Court of Appeals has now adopted the rule that, despite a demonstration of perjury by a prosecution witness, the defense must demonstrate that in the absence of such perjury they "*probably*" would have returned a different verdict. (26a-30a).

The Court of Appeals has acknowledged that its new standard is in conflict with the existing rule in several other circuits (26a, fn. 9).*

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* *See*: e.g., *United States* v. *Anderson*, 509 F.2d 312, 327 n. 105 (D.C. Cir., 1974), *cert. denied*, 420 U.S. 991 (1975); *United States* v. *Johnson*, 487 F.2d 1278, 1279 (4th Cir., 1973); *United States* v. *Meyers*, 484 F.2d 113, 116 (3d Cir., 1973); *United States* v. *Briola*, 465 F.2d 1018, 1022 (10th Cir., 1972), *cert. denied*, 409 U.S. 1108 (1973); *United States* v. *Curran*, 465 F.2d 260, 264 (7th Cir., 1972); *United States* v. *Strauss*, 443 F.2d 986, 989 (1st Cir.), *cert. denied*, 404 U.S. 851 (1971); *United States* v. *Smith*, 433 F.2d 149, 151 (5th Cir., 1970).

In rejecting the former rule, the Court of Appeals stated as follows:

> "[T]he test, if literally applied, should require reversal in cases of perjury with respect to even minor matters, especially in light of the standard jury instruction that upon finding that a witness had deliberately proffered false testimony in part, the jury may disregard his entire testimony. Thus, once it is shown that a material witness has intentionally lied with respect to any matter, it is difficult to deny that the jury, had it known of the lie, 'might' have acquitted. We recognize that those who have professed adherence to the Larrison test do not appear to share our concern over the problems arising from its speculative nature. * * * " (27a).

In fact, the "probability" test is no less speculative than the "might have" test. We respectfully submit that the issue to which this Court should address itself is whether due process of law and the proper administration of justice in the Federal courts will permit a conviction to stand where it might have been the result of concededly perjurious testimony. The willingness of the Second Circuit Court of Appeals to permit such a state of affairs to exists flies in the face of the oft-quoted statement in *People* v. *Savvides*, 1 N.Y. 2d 554 at 556 (1956): "The administration of justice must not only be above reproach, it must be beyond the suspicion of reproach." *See also*: *Mesarosh* v. *United States, supra.*

In *Savvides, supra,* which involved a prosecutor's failure to disclose a witness's perjury, Judge Fuld held as follows:

> "It is of no consequence that the falsehood fell upon the witness's credibility rather than directly upon defendant's guilt. A lie is a lie, no matter

> what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth. Nor does it avail respondent to contend that defendant's guilt was clearly established or that disclosure would not have changed the verdict. The argument overlooks the variant functions to be performed by jury and reviewing tribunal. 'It is for jurors, not judges of an appellate court such as ours, to decide the issue of guilt.' People v. Mleczko, 298 N.Y. 153, 163. We may not close our eyes to what occurred; regardless of the quantum of guilt or the asserted persuasiveness of the evidence, the episode may not be overlooked. * * *" 1 N.Y. 2d at 557.

The issue is not significantly different merely because the prosecutor in the instant case did not have actual knowledge of Glasser's perjury through the course of two trials. If the jury had known of Glasser's prior perjury, of the many manufacturers with whom he had had such dealings, and of the mass of money he had accumulated, they could well have rejected his testimony all together or could have concluded that his testimony did not establish guilt to the exclusion of the four possibilities of innocence (*supra*, p. 13), beyond a reasonable doubt.

To require a defendant to establish to a trial or appellate judge that the jury would probably have acquitted him, is to require an impossibility. Such a standard effectively leaves the resolution of the problem to the whim and caprice of the trial judge. It should be rejected by this Court as being violative of due process and as being unworthy of the administration of justice in the Federal courts.

III

The Court of Appeals also taxes trial counsel with a lack of due diligence (8a-9a). This Court does not appear to have passed upon the "due diligence" requirement which has been judicially engrafted upon the requirements of Rule 33, F. R. Cr. P.

Petitioner does not contend that the defense may close its eyes to available evidence or that the defense does not have an investigative responsibility. We respectfully submit, however, that where, as in the present case, a prosecution witness has perjured himself both as to immediately relevant areas of inquiry and as to all lines of inquiry which would disclose his initial perjury, the defense cannot be faulted for not tracking down every possible lead. Any witness may present a hundred different areas of investigation which, if followed, might have a telling effect upon his credibility. Hardly any defendant has the resources or the time to follow such leads.

In its brief in the Court of Appeals in the *Stofsky* case (Docket No. 74-1860), the trial of which preceded the trial in the present case, the government stated as follows with respect to the inquiries made in that case concerning Glasser's finances:

> "Trial commenced on February 11, 1974 and on that date, pursuant to an subpoena *duces tecum*, Glasser made available to defendant's counsel a copy of his 1972 Federal joint income tax return (DX H) which declared $6,151.00 in interest payments from several savings banks [footnote omitted]. Glasser was called to testify on February 13 . . . and his testimony continued through February 14. Mrs. Glasser testified as a government witness on February 15.

> "On February 14, defendant's counsel cross-examined Glasser concerning the source of the $120,000 in deposits at the three savings banks indicated on Glasser's 1972 return, which had given rise to the interest payments reported thereon. Glasser testified that most of that $120,000 had been inherited by his wife and had been deposited in savings accounts a long time ago. (A. 163a, 165a-166a, 329); and that from 1967-1969 he had received from the Union manufacturers a total of approximately $15,000 to $16,000, of which he had kept approximately $5,000 (A. 167a). In her testimony the next day, Mrs. Glasser affirmed that in 1940, at her fathers' death, she had inherited approximately $60,000; and that in 1944, at her mother's death, she had inherited an additional $30,000 to $40,000; and that, accordingly, she and Mr. Glasser had $100,000 in savings accounts as early as 1945 (A. 181a)." (Government's Brief in *United States* v. *Stofsky, et al., supra*, at pp. 47-48).

In its brief in *Stofsky*, the government went on to describe how, during the course of the *Stofsky* trial, defense counsel in that case obtained some of Glasser's bank records, none of which revealed that deposits had been made in *cash*. The government described the events in the *Stofsky* trial, following the receipt of those records, as follows:

> "The transcript [of bank records] received by defendant's attorney on February 20 showed that the Glassers had deposited $38,156.97 in savings accounts at the East New York Savings Bank during the years 1967-1970. Glasser was recalled by the government and vigorously cross-examined by defendant's counsel on the basis of his tax returns

> for 1967 through 1971 supplied that day by the government to defendant's counsel (Tr. 956). Although the principal thrust of that examination sought to establish that Glasser had pocketed entirely any and all payoffs he had ever received from manufacturers, defendant's counsel made no use of the transcript that day and never sought thereafter to have Glasser recalled for further cross-examination (A. 328a-332a). Moreover defendant's counsel did not offer this transcript in evidence on defendant's own case to impeach the testimony of the Glassers concerning the source of the funds in their savings accounts. Defendant's counsel did choose to introduce at trial for this purpose probate records of the estates of Mrs. Glasser's parents (A. 601a-602a; DXs AM, AN), indicating that she had received from the estates of her father and mother approximately $1200 and $1600, respectively." (Government's Brief in *United States* v. *Stofsky, et al., supra*, at p. 48).

In the present case, the Court of Appeals notes that defense counsel had access to the *Stofsky* trial record at the time of petitioner's trial and could have, but did not, pursue the area of inquiry described *supra* (9a). However, an examination of the above noted facts would indicate to any reasonable person that the "key" had been turned in the prior trial, but had not opened the door for any kind of effective attack on Glasser. It appeared to petitioner's counsel as though both defense counsel and the government in the prior trial had had access to the bank records, and that Glasser had been interrogated to the fullest extent imaginable, all to no avail. Under these circumstances, it is respectfully submitted, neither petitioner nor his attorney can be faulted for failing to follow the same path which had so unsuccessfully been pursued in the prior trial. That path had been blocked by Glasser's perjury as well as that of

Glasser's wife, and had been hidden by the bank's failure to reveal that it still possessed the cash deposit records.

It is certainly true that, if anything, the government had in its possession far greater knowledge of Glasser's finances than did defense counsel. The same government attorneys tried both cases. If the defense herein should have been alerted to the evidentiary possibility of the bank records, that conclusion applies, *a fortiori*, to the prosecution, who repeatedly sponsored Glasser as a witness. However, in assessing whether the government had negligently failed to follow through upon an investigation of its own witness, the Court of Appeals held as follows:

> "We do not employ the omniscience of a monday morning quarterback as the standard for determining what investigation should have been made by the government. Although a diligent prosecutor, in the interest of protecting himself against surprise on the part of his principal witness, might well have audited Glasser's finances before putting him on the stand, there was no obligation to do so, since the government, in February, 1974, did not have reason to believe that Glasser, blessed with transactional immunity, would have any incentive to engage in falsehoods concerning his own monetary affairs. * * *" (23a)

The instant case uniquely juxtaposes the diligence requirements placed upon the prosecution and the defense. This Court is, therefore, presented with the issue of whether the failure of defense counsel to possess such omniscience with respect to the cleverly committed and compounded perjury of two government witnesses (Glasser and his wife) at a prior trial, constituted a lack of diligence sufficient to deprive petitioner of an opportunity to a new trial free of such perjury.

IV

The district court declined to grant petitioner an evidentiary hearing at which Glasser would be called as a witness for the purpose of determining the extent and reason for his now-admitted perjury. In opposing the motion for a new trial, the government did not submit any affidavit or verbatim statement from Glasser. Instead, government counsel interviewed Glasser, who eventually admitted his perjury, and his admissions were included in an affidavit of government counsel (A. 23, 28, 31, 77, 88, 101, 194, 267). Nowhere does the government offer Glasser's reasons for *why* he perjured himself. That question should have been the subject of careful cross-examination by defense counsel at an evidentiary hearing. In the absence of such an examination, the defense was completely deprived of any opportunity to demonstrate the full ramifications of the *admitted* perjury.

In resolving the motion purely upon the hearsay affidavit of the prosecutor, the lower courts committed clear error and the case should be remanded for a hearing, *United States* v. *Keogh*, 391 F.2d 138 (2d Cir., 1968); *Berger* v. *United States*, 295 U.S. 78 (1974); *United States* v. *Zbrowski*, 271 F.2d 661, 668 (2d Cir., 1959); *Napue* v. *Illinois*, 360 U.S. 264, 269-270 (1959); *Dunn* v. *United States*, 245 F.2d 407 (6th Cir., 1957); *Smith* v. *United States*, 259 F.2d 125 (9th Cir., 1958); *United States* v. *Derosier*, 229 F.2d 599 (3d Cir., 1956); *James* v. *United States*, 175 F.2d 769 (5th Cir., 1949).

It is respectfully submitted that any fair-minded individual, when confronted with the sordid history of Glasser's brazen perjury, would demand an open hearing for the purpose of ascertaining the truth. The failure to grant such a hearing negates even the appearance of justice. Instead, it appears as though every effort is being made "to keep the lid on" the possibility that Glasser's testimony at such a hearing would undo the government's case.

CONCLUSION

For all of the above reasons, the petition for a writ of certiorari should be granted, the judgment of conviction should be reversed, and a new trial should be granted; in the alternative, the case should be remanded to the district court for an evidentiary hearing as to the newly discovered evidence.

Respectfully submitted,

EDWARD BRODSKY
HENRY J. BOITEL
Attorneys for Petitioner

December, 1975

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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-819

KARL SCHWARTZBAUM,

Petitioner,

—VS.—

UNITED STATES OF AMERICA,

Respondent.

APPENDIX
TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX TO APPENDIX

PAGE

Appendix A—Opinion of Court of Appeals, *United States* v. *Schwartzbaum* 1a

Appendix B—Opinion of Court of Appeals, *United States* v. *Stofsky* 13a

Appendix C—Endorsement Order of District Court Denying First Motion for New Trial, *United States* v. *Schwartzbaum* 36a

Appendix D—Opinion of District Court Denying First Motion for New Trial, *United States* v. *Stofsky* 37a

Appendix E—Endorsement Order of District Court Denying Second Motion for New Trial, *United States* v. *Schwartzbaum* 55a

Appendix F—Memorandum Opinion of District Court Denying Second Motion for New Trial, *United States* v. *Stofsky* 57a

Appendix G—Constitutional, Statutory and Regulatory Provisions Involved 63a

APPENDIX A—Opinion of Court of Appeals, *United States v. Schwartzbaum*

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 9 and 410—September Term, 1975.

(Argued September 22, 1975 Decided November 7, 1975.)

Docket Nos. 74-1901 and 75-1337

UNITED STATES OF AMERICA,

Appellee,

—v—

KARL "JACK" SCHWARTZBAUM,

Defendant-Appellant.

Before:

LUMBARD, MANSFIELD and TIMBERS,

Circuit Judges.

Appeal from a judgment of conviction entered in the United States District Court for the Southern District of New York after a jury trial, Lawrence W. Pierce, *Judge*, finding the defendant guilty of having made illicit payments to officers of the Furriers Joint Council, a labor union, 29 U.S.C. 186(a).

Affirmed.

V. THOMAS FRYMAN, JR., Assistant United States Attorney, New York, N.Y. (Paul J. Curran, United States Attorney for the Southern District of New York; John C.

APPENDIX A—Opinion of Court of Appeals, United States v. *Schwartzbaum*

Sabetta, Assistant United States Attorney; New York, N.Y., on the brief), *for Appellee.*

HENRY J. BOITEL, Esq., New York, N.Y. (Goldstein, Shames & Hyde; Edward Brodsky; and William Esbitt; New York, N.Y.; on the brief), *for Appellant.*

LUMBARD, *Circuit Judge:*

In *United States* v. *Stofsky,* decided today, we affirmed the conviction in the Southern District of four officials of the Furriers Joint Council (the Union) for, inter alia, accepting the payment of money from certain employers in violation of 29 U.S.C. 186(b).[1] In an indictment returned on June 21, 1973, Karl "Jack" Schwartzbaum, a fur manufacturer and appellant herein, was charged with having made four such illicit bribes of $150 each during 1969 and 1970 in an effort to assure union approval for his continuous breach of the collective bargaining agreement, 29 U.S.C. 186(a).[2] On April 4, 1974, following a

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1 29 U.S.C. 186(b)(1) provides:

> It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

The union leaders convicted thereunder were George Stofsky, Charles Hoff, Al Gold and Clifford Lageoles.

2 29 U.S.C. 186(a) reads:

> It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, advisor, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend or deliver, any money or other thing of value . . . (4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

four day trial, a jury returned a verdict of guilty on all three counts presented to them.[3] Schwartzbaum has appealed from that conviction and the $1,000 fine imposed for each count, as well as from orders of Judge Pierce dated May 14, 1974, June 24, 1974, June 4, 1975 and June 5, 1975 denying his post-trial motions for a new trial and dismissal of the indictment. We affirm.

Manhattan's fur garment industry, consisting of approximately 600 union manufacturers and 400 non-union firms, is geographically concentrated from 27th to 30th Streets between Sixth and Eighth Avenues. As of 1968, some 350 of the unionized companies, including that owned by appellant, had organized themselves into the Associated Fur Manufacturers (the Association) for purposes of negotiating a joint agreement with the Furriers Joint Council. The work preservation provisions of that agreement, as detailed in our opinion in *Stofsky*, proscribed the "contracting" of work to non-union shops and the purchase of finished fur garments from countries outside the United States. These provisions were and are policed almost exclusively by the Union, which during the relevant period employed seven business agents, each assigned to roughly one hundred small shops, to ferret out contractual violations. Disputes which could not be resolved by informal consultation between the Union and one of several labor adjusters retained by the Association, were referred to a committee headed by an Impartial Chairman. A manufacturer found to have breached the agreement was subject to either fine or strike.

Sam Sherman, Harry Hessel and Sol Cohen, also fur manufacturers, were indicted along with appellant. Each pleaded guilty to one count of violating 29 U.S.C. 186(a).

3 Schwartzbaum's indictment charged him, in four counts, with having violated 29 U.S.C. 186(a). However, the last of these counts, dealing with an alleged payment of $150 in 1970, was dismissed with the government's consent at the close of its case.

Despite these potential sanctions, K. J. Schwartzbaum, Inc. (KJS) began in 1968 to "contract" part of its work in order to improve what the appellant perceived to be a deteriorating competitive position. By 1970, 25 to 50 percent of the garments sold by the firm were manufactured by outside contractors. The attraction of contracting was that it enabled the employer to avoid the higher salaries and fringe benefits required by the Union contract. To disguise these activities from Union representatives permitted by the agreement to inspect the company's books, Schwartzbaum funnelled all payments to contractors through a special bank account established for that purpose by Murray Bittman, his vice-president.

In addition, Schwartzbaum sought further protection by soliciting the aid of Jack Glasser, Association labor adjuster assigned to his firm. Testifying under a grant of transactional immunity, Glasser stated that he received a telephone call from the appellant in May, 1968, requesting that he come to a meeting at the KJS offices. As recounted by Glasser, Schwartzbaum told him at that meeting that he had been contracting and asked whether there was any way to secure the cooperation of the Union. Glasser, who had previously relayed money from other manufacturers seeking absolution for contracting violations, spoke the following day to Charles Hoff, assistant manager of the Union. Hoff consented to a similar arrangement for Schwartzbaum whereupon Glasser returned to KJS and told the appellant, "I have the okay from Charlie Hoff." Glasser added that over the next two years he received six installments of $300 each from Schwartzbaum and that each time he forwarded one half of that sum to Hoff, identifying the appellant as its source. Throughout those years, KJS operated free from the union "harassment" which Schwartzbaum had feared. Shortly after Glasser's forced departure from the industry, KJS was fined $3,500.

Glasser further testified that he served as a conduit for payments to a second Union official, Harry Jaffee. These payments, not charged in the indictment, became necessary because Jaffee's position as Union business agent for KJS placed him in a unique position to observe its contracting activities. On at least one occasion, Jaffee was taken aside, handed $100 which he was told was from Schwartzbaum, and instructed to ignore any infractions which he might have seen. Jaffee, guaranteed testimonial immunity, confirmed this portion of Glasser's story.

After the return of the original indictment against him on March 27, 1973,[4] and aware that its allegations had been publicized in the local newspapers, Schwartzbaum became concerned about the possible reaction of Chase Manhattan Bank, with whom KJS had $400,000 in outstanding inventory loans. Appellant therefore contacted Albert Chambers, the responsible officer at Chase, and arranged a meeting to discuss his affairs. Chambers testified at trial that at this meeting on April 3, 1973, Schwartzbaum confessed to him that he had made payments to union officials totalling $600 but discounted their magnitude and importance, suggesting that the reason for his indictment might simply have been to secure his assistance in prosecuting the government's principal targets. He assured Chambers that, in any event, his legal difficulties would have no adverse effect upon the operation of his company.

Schwartzbaum presented no defense to these charges other than the testimony of his wife who placed him in Florida at about the time when Glasser indicated that he had received two of the payments in New York. In contrast to the strategy of the union defendants in *United*

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4 The indictment under which appellant was actually tried, 73 Cr. 616, was filed on June 21, 1973, and superseded the earlier indictment filed on March 27, 1973.

States v. *Stofsky*, whose trial had ended in conviction five weeks earlier, appellant made no attempt to probe Glasser's personal finances in an effort to show that he had retained rather than transmitted any monies paid to him.

I

In the wake of his conviction, Schwartzbaum made three new trial motions, all of which were denied by Judge Pierce. The first of these contended that the district court committed error in permitting the use of a government prepared memorandum to refresh Glasser's memory and then in refusing appellant's request to examine the Assistant United States Attorney ("AUSA") regarding the document.

As previously indicated, Glasser had testified on direct examination that in his conversations with Schwartzbaum he had specifically identified Charles Hoff as the union official to whom the pay-offs were made. He retreated, however, under the pressure of cross-examination and conceded the possibility that he had not done so. On re-direct, the AUSA showed Glasser a summary of an earlier interview with the prosecutors in which Glasser had recalled the use of Hoff's name. His memory thus refreshed, Glasser reaffirmed his original testimony. At this point, appellant's counsel unsuccessfully moved to call the AUSA and question him as to the circumstances under which the summary was written.

The clear but unspoken implication underlying both of Schwartzbaum's claims of error in his first new trial motion, was that in directing Glasser's attention to the memorandum in question, the government's intent was to suggest rather than refresh. We agree with the district court that there is absolutely nothing in the record to support this serious allegation of prosecutorial misconduct. The government's papers in opposition to this motion amply and

convincingly elucidated the innocent history of this challenged document. Moreover, appellant's argument overlooks the fact that on direct examination and without the aid of the memorandum, Glasser had given substantially similar testimony on the disputed issue. Judge Pierce did not abuse his discretion in dismissing Schwartzbaum's unsubstantiated suspicions and adhering to the general principle that any writing may be used to refresh the recollection of a witness, even if that writing is not made by the witness himself, Wigmore on Evidence, Vol. III, §§758-9.

Nor was any reason shown to permit the defendant to call government counsel as a witness. Such a procedure, inevitably confusing the distinctions between advocate and witness, argument and testimony, is acceptable only if required by a compelling and legitimate need. *United States* v. *Torres*, 503 F.2d 1120, 1124 (2d Cir. 1974); *United States* v. *Newman*, 476 F.2d 733 (3d Cir. 1973). Schwartzbaum fell far short of that standard in this case. The use of the memorandum itself would have sufficed to establish inconsistencies between Glasser's in-court statements and those purportedly made extrajudicially. See *United States* v. *Fiorillo*, 376 F.2d 180 (2d Cir. 1967). Had there been a genuine belief that the memorandum had been fabricated, the proper procedure would have been to request a hearing outside of the jury's presence. No such request was made.

II

Schwartzbaum's second new trial motion was based upon evidence of Glasser's perjury at the Stofsky trial, uncovered by counsel for Stofsky and raised concurrently as a basis for reversal of the Stofsky convictions.[5] Appellant

5 In *United States* v. *Stofsky*, we have today considered and rejected the claim of the Stofsky defendants.

contends that the belated revelation that Glasser had made large scale cash deposits during the period in which he claims to have served as conduit for illegal payments from employers to union leaders in the fur garment industry suggests an extensive history of illegal dealings from which the jury might well have concluded that Glasser was incapable of recalling or distinguishing the precise substance of his conversations with Schwartzbaum. Appellant also argues that such large accumulations of cash strongly imply that no money was ever delivered to the labor leaders as charged in the indictment and required for conviction under 29 U.S.C. 186(a).

This "new" information, now deemed so critical, was the product of subpoenas duces tecum served by the Stofsky attorneys on the East River Savings Bank, the Greenwich Savings Bank and the Emigrant Savings Bank on April 10, 1974, six weeks after the Stofsky trial and one week following appellant's conviction. The existence of Glasser's accounts in each of these banks had been indicated on his 1967-1971 federal income tax returns, copies of which the government had turned over to the Stofsky defense pursuant to court order on February 20, 1974. An examination of Glasser's deposit slips submitted in response to these subpoenas revealed that, contrary to his testimony at the Stofsky trial,[6] Glasser had deposited in his various savings accounts a total of $61,659.05, of which approximately $57,000 was in cash.

At the threshold, however, it is well-settled that the burden is upon the movant in a new trial motion to establish that he could not, with due diligence, have discovered the evidence before, or at the latest, at trial. *United*

6 At the Stofsky trial, Glasser and his wife testified that the $120,000 aggregated in his various savings accounts had been derived from an inheritance received by his wife in the early 1940's. It is undisputed that their testimony on this point was perjurious.

States v. *Costello*, 255 F.2d 876, 879 (2d Cir.), *cert. denied*, 357 U.S. 937 (1958). We agree with Judge Pierce that Schwartzbaum failed to satisfy that requirement.

The Stofsky trial had preceded that of appellant by nearly five weeks. We have been informed of no reason, and perceive none ourselves, why during that interim the Schwartzbaum attorneys could not have investigated precisely those same leads later pursued by counsel for Stofsky. Appellant's frequent references to the Stofsky transcript during the course of his own trial indicate that he must have been, or should have been, aware of the fact that Glasser's tax returns had been requested and produced on February 20, 1974.[7] Had he subpoenaed the records of the banks therein noted at any time during the ensuing month, Glasser's deposit slips could have been delivered within two to four business days[8] and in Schwartzbaum's possession well in advance of the beginning of his trial on April 1. Moreover, appellant made no attempt during cross-examination to inquire into the source of Glasser's small fortune.[9] The evidence upon which he now so strongly relies was, at most, only collateral to the factual issues contested at trial.

We are unpersuaded by appellant's contention that a jury would likely have deduced from Glasser's $57,000

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7 In fact, counsel for Stofsky affirms that at a meeting in March, 1974, he notified appellant's lawyer that evidence indicating Glasser's cash deposits had been uncovered. However, counsel for Schwartzbaum, who suffers from a hearing impairment, denies any recollection of being so informed. Our conclusion that appellant's attorney should himself have pursued the information contained in Glasser's tax return makes it unnecessary for us to resolve this uncertainty.

8 Officers of the East River, the Emigrant and the Greenwich savings banks, all submitted affidavits to that effect.

9 This decision may well be explained by the conclusion of Judge Pierce that revelation of widespread corruption in the fur garment industry was more likely to weaken the defense than to strengthen it.

in cash deposits that the entire $900 which had been given him by Schwartzbaum and for which Schwartzbaum was convicted, had likewise been placed in his personal savings accounts. The disproportion of the figures renders wholly speculative any logical nexus between them. It is true that Glasser's credibility might well have been impeached by exposing to the Schwartzbaum jury his perjury at the earlier Stofsky trial. But, had appellant exercised due diligence in retrieving Glasser's bank records, he could easily have established these inconsistencies at his own trial by a comparison with the Stofsky minutes which he already possessed and frequently referred to.

The standard for granting a retrial on the ground of newly discovered evidence is whether that evidence is "of such a nature that it would probably produce a different verdict in the event of a [new trial]." [10] *United States* v. *DeSapio*, 456 F.2d 644, 647 (2d Cir.), *cert. denied*, 406 U.S. 933 (1972).

The government presented persuasive evidence of Schwartzbaum's guilt. Chambers testified as to Schwartzbaum's confession to him and Jaffee admitted the receipt of monies which Glasser told him were being relayed from the appellant. Furthermore, Schwartzbaum's firm operated free of Union harassment during the period in which Glasser was operating as a bag-man but was fined $3,500 almost immediately following his departure from the industry. Viewing all the evidence, we agree with Judge Pierce that there is little likelihood that the jury's verdict would have been affected by disclosure of Glasser's prior perjury and his previously concealed deposits.

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10 An extensive discussion of the applicable standard for reviewing and granting new trial motions is contained in our opinion in *United States* v. *Stofsky*.

III

Schwartzbaum's third new trial motion, also paralleling an identical motion raised by the Stofsky defendants, was based upon the prosecution's tardy disclosure that the full extent of Glasser's deposits totalled $157,000 between 1962 and 1970, somewhat more than the approximately $61,000 between 1967 and 1970 earlier indicated. This information was uncovered during the pendency of appellant's second new trial motion as a result of the government's continuing investigation into Glasser's personal finances. Nevertheless, the government unilaterally decided to withhold this discovery until the completion of their investigation. It was not until September 12, 1974, after Schwartzbaum's second new trial motion had been denied and his notice of appeal filed, that the United States Attorney, sua sponte, sent a letter to appellant's counsel notifying him of Glasser's additional deposits. By stipulation, the appeal was then stayed pending the resolution in the district court of Schwartzbaum's third new trial motion.

This latest motion differed from the second only in the increased magnitude of Glasser's deposits; the theories by which appellant argues he might have exploited this new evidence remain the same. We concur in Judge Pierce's conclusion that the strong case against Schwartzbaum would probably not have been affected by these newest revelations. "Whether Glasser had secreted $58,000 or $157,000 dollars in his checking and savings accounts would . . . have little significance at a new trial."

In the absence of any evidence that the government was guilty of bad faith in delaying the relinquishment of Glasser's financial record,[11] there is no need for a hearing

11 To the contrary, the actions of the prosecution in turning over the records and agreeing to a stay of Glasser's pending appeal, indicate a good faith desire to cooperate with the defense.

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to inquire into prosecutorial misconduct, as Schwartzbaum now contends. Schwartzbaum was permitted to make a third new trial motion and thus suffered no prejudice from the delay in being furnished the additional evidence of Glasser's savings bank deposits. *United States* v. *Rosner*, 516 F.2d 269 (2d Cir. 1975).

IV

As fully elaborated in our opinion in *Stofsky*, we find no merit in appellant's remaining attack upon the legal sufficiency of the indictment under which he was tried and convicted. We hold that the grand jury which returned the superseding indictment against him in the twenty-seventh month of its existence had been properly impanelled and its life validly extended under the provisions of the Organized Crime Control Act of 1970, 18 U.S.C. 3331. Schwartzbaum's contention that the Strike Force Attorney who presented the case to that grand jury lacked adequate authorization has already been rejected by us. *See e.g. In re Grand Jury Subpoena of Alphonse Persico*, Docket No. 75-2030 (2d Cir., June 19, 1975), slip op. pp. 4129-4191.

Affirmed.

APPENDIX B—Opinion of Court of Appeals, *United States v. Stofsky*

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 4, 5, 6, 7—September Term, 1975.

(Argued September 22, 1975 Decided November 7, 1975.)

Docket Nos. 74-1860, 74-1869,
75-1247, 75-1253

UNITED STATES OF AMERICA,

Appellee,

—against—

GEORGE STOFSKY, CHARLES HOFF,
AL GOLD and CLIFFORD LAGEOLES,

Defendants-Appellants.

Before:

LUMBARD, MANSFIELD and TIMBERS,

Circuit Judges.

Appeals from judgments of conviction entered in the United States District Court for the Southern District of New York after a jury trial, Lawrence W. Pierce, *Judge,* finding (1) all defendants, officials of the Furriers Joint Council, guilty of conspiracy to accept payment from employers and to conduct the Union's affairs through a pattern of racketeering, and of accepting such payments, 18 U.S.C. §371, 29 U.S.C. §186(b), (2) defendants Stofsky and Gold guilty of engaging in a pattern of racketeering activity, 18 U.S.C. §1961(1)(B), and of corruptly endeavor-

ing to influence a witness before a federal grand jury, 18 U.S.C. §1503, and (3) defendants Stofsky, Hoff and Gold guilty of attempting to evade federal income tax, 26 U.S.C. §7201.

Affirmed.

ELKAN ABRAMOWITZ, Esq., New York, N.Y. (Michael R. Sonberg, Esq., Weiss Rosenthal Heller & Schwartzman, Paul K. Rooney, Esq., Elliot L. Evans, Esq., Rooney & Evans, New York, N.Y., of counsel), *for Appellants Stofsky and Gold.*

LEONARD B. BOUDIN, Esq., New York, N.Y. (Rabinowitz, Boudin & Standard, Stephen Barasch, Esq., New York, N.Y., of counsel), *for Appellants Hoff and Lageoles.*

JOHN C. SABETTA, Assistant United States Attorney (Paul J. Curran, United States Attorney for the Southern District of New York, V. Thomas Fryman, Jr., Lawrence B. Pedowitz, John D. Gordan, III, Assistant United States Attorney, New York, N.Y., of counsel), *for Appellee.*

MANSFIELD, *Circuit Judge:*

Once again in the wake of the discovery that a government witness committed perjury at trial we are called upon to strike a fair balance between the need for both integrity and finality in criminal prosecutions. Because we conclude that the perjury in issue is not of such significance as to have unfairly tainted defendants' convictions and find no merit in appellants' other points on appeal, we affirm.

On June 21, 1973, a federal grand jury handed down an

indictment naming appellants, all of whom are officers and employees of the Furriers Joint Council (the "Union"), a trade union representing New York fur workers. The indictment alleged a variety of offenses, the principal of which was a conspiracy to demand and accept payments from employers and to conduct the Union's affairs through a pattern of racketeering in violation of 18 U.S.C. §371 (Count 1) and the acceptance of payments of money from certain employers in violation of 29 U.S.C. §186(b)[1] (Counts 2-22). In addition, Count 23 charged that defendants Stofsky and Gold, the Union's Manager and Organizer, respectively, had conducted the Union's affairs through a pattern of racketeering activities in violation of 18 U.S.C. §§1961 (1)(B) and (C) and 1962(c).[2] Count 24 charged Stofsky and Gold with corruptly endeavoring to influence a grand jury witness in violation of 18 U.S.C. §1503. In addition, Stofsky, Hoff and Gold were charged, each in two counts respectively, with attempting to evade federal income tax in violation of 26 U.S.C. §7201 (Counts 25-27, 31-33). After a two-week trial the jury on February 27, 1974, found each defendant guilty on all counts[3] in which he was charged.

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1 29 U.S.C. §186(b) reads:

"It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section."

2 18 U.S.C. §1961(1)(B) provides a long listing of examples of federal racketeering activity. 18 U.S.C. §1961(1)(C) specifically defines "racketeering activity" as "any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) . . . ." And 18 U.S.C. §1962(c) prohibits any person employed or associated with an enterprise affecting interstate commerce "to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. . . ."

3 Judge Pierce sentenced Stofsky to 3 years' imprisonment and fines totaling $13,000; Hoff to 3 years' imprisonment and fines totaling

According to the government's theory, this seemingly wide range of transgressions actually resulted from one common enterprise: a series of arrangements entered into through a middleman whereby certain fur manufacturers[4] paid bribes through the middleman to the defendants during the period 1967-70 in return for permission to violate certain provisions of the collective bargaining agreement in force in the New York locale between their fur manufacturing firms and the Union. In particular, the Union contract contained provisions forbidding "contracting" and regulating "jobbing" practices whereby a union-shop manufacturer distributed fur skins to outside non-union production units for completion into merchantable garments. Faced with rising labor costs under the Union contract, some manufacturers sought to exploit the possibilities of employing cheaper, outside labor through use of the non-union contractors. The Union, on the other hand, maintained a surveillance system designed to detect any such violations and was authorized by the agreement to inspect the records of each union-shop manufacturer for the purpose of uncovering any such violations. A complaint by a Union agent charging a violation of the anticontracting provisions of the Union agreement could result in the imposition of heavy fines on the manufacturer or loss of protection against picketing or strikes.

To establish certain counts of the indictment (e.g., Counts 6-14, 18-22) the government relied principally on the testi-

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$11,000; Gold to 2 years' imprisonment and fines totaling $10,000; and Lageoles to 2 years' imprisonment, execution suspended, and fines totaling $2,000.

4 The government separately indicted four fur manufacturers for making such illegal payments in violation of 29 U.S.C. §186(a). Three pleaded guilty and have been fined. The fourth manufacturer, Karl Schwartzbaum, was also fined following a jury verdict of guilty. We today affirm his conviction in a separate opinion.

mony of one Jack Glasser,[5] a labor adjustor employed by the fur manufacturers association, Associated Fur Manufacturers, Inc. (the "Association"), which was substantially corroborated by other evidence, including testimony by fur manufacturers, a union business agent and two attorneys who were brought into the picture by some of the defendants to assist in furnishing advice to Glasser after he had been discharged by the Association for misconduct and had come under investigation by the federal government. In support of other counts of the indictment (e.g., Counts 2-5, 16-17), the government offered the testimony of fur manufacturers regarding payments made by them directly to certain of the defendants for permission to engage in contracting without Union harassment. Since the principal issue raised on the appeal is the claim that Glasser's perjury tainted the convictions, it becomes important to keep his testimony and its relation to the other proof in perspective.

Because Glasser's duties as a labor adjustor for the fur manufacturers brought him in close contact with officials of the Union, he was in a unique position to act as a middleman in bribing Union officials to permit contracting. He testified that on different occasions during the period 1967-1970 he accepted monies from different fur manufacturers (Sam Sherman, Harry Hessel, Breslin Baker, Karl Schwartzbaum, Sol Cohen and Daniel Ginsberg) to arrange Union protection for their illegal contracting, part of which he kept and the balance of which he paid over to one or more of the four defendants. Following the payments the manufacturers who paid the monies received preferential treatment from the Union in its enforcement of the anti-contracting provisions of the collective bargaining agree-

5 The government granted Glasser transactional immunity for his part in these activities.

ment. On the rare occasions when a Union agent, apparently unaware of the illegal arrangement, filed a complaint charging contracting in violation of the agreement, the complaint was suppressed by the defendants or disposed of through imposition of a token fine.

Glasser's testimony was substantially corroborated by the testimony of one fur manufacturer, Daniel Ginsberg, to the effect that in 1969 he paid $1,000 to Glasser to secure Union permission to use contractors and that the Union agents thereafter discovered evidence of his contracting, Glasser advised that he would take the matter up with Hoff or Stofsky and "have it fixed," following which he heard nothing more about the matter. Harry Jaffee, a Union business agent, testified to receiving from Glasser 6 to 10 cash payments, each of $50 or more, for ignoring violations by two manufacturers (Schwartzbaum Furs and Chateau Creations, Inc.) of the Union agreements' anti-contracting provisions.

The arrangement between certain fur manufacturers and Glasser was terminated when the fur manufacturers association fired Glasser in 1970 after discovering that he had been used by these members as an instrument of corruption. As further evidence of the defendants' complicity the government offered Glasser's testimony that upon being asked in 1972 by an investigator of the New York Joint Strike Force, Detective Civitano, to submit to interrogation, Glasser immediately communicated with Hoff, who arranged for him to meet an attorney, Irving Anolik, Esq., who in turn agreed to represent Glasser for $2,000. Glasser also conferred with Stofsky, Hoff and Gold at the Hotel New Yorker, where they counseled him as to how he should handle himself during the interrogation. Following the interrogation he met again with Stofsky, Hoff and Gold at the Hotel Hilton in New York City, where he related to them his conversation with the Strike

Force investigator. Glasser further testified that shortly thereafter he was again called for interrogation and served with a subpoena to appear before a federal grand jury. He again met with Stofsky and Gold who, through the Union's General Counsel, obtained an attorney named Arthur Hammer to represent him. According to Glasser, Stofsky advised him "not to tell . . . anything, to take the Fifth" and that he would facilitate Glasser's receipt of his industry pension. Harold Cammer, called as a witness by the government, confirmed that at Gold's request he had recommended Mr. Hammer as an attorney to represent Glasser in the grand jury investigation.

Another fur manufacturer, William Stiel, testified to making payments of money directly to Gold in 1968 and 1969 for permission to engage in contracting. Daniel Grossman, a large scale fur manufacturer, testified to making arrangements in 1970 and 1971 with Gold and Stofsky for two payments per year of $6,000 each for continuation of Grossman's contracting activities, and to his direct payment of these amounts to Gold. During the period of the payoffs Grossman's firm was not subjected to any fines, picketing or strikes even though Gold inspected skins bearing Grossman's seal in the shop of a contractor, William Poulos, who also testified for the government.

The defense put in by all defendants was essentially the same—a denial that they had received any monies from any fur manufacturers, either directly or through intermediaries. Although the defendants did not seriously dispute Glasser's receipt of bribes from certain manufacturers, they contended that he never shared his bounty with them but must instead have retained the payments for himself. Lacking support for this theory other than their own denials, the defense on the first day of trial obtained by subpoena Glasser's 1972 income tax return,

which revealed the receipts of over $6,000 in interest payments from deposits of roughly $120,000 in several savings banks. Upon cross-examination as to the source of the $120,000, Glasser testified falsely that most of the money had been acquired by his wife through inheritance some 20 years earlier. His wife, called by the government, corroborated this false story. Although the defendants, some six days before the end of the trial, obtained a transcript from one of the Glassers' savings accounts (The East New York Savings Bank) showing that the Glassers had made a series of deposits amounting to $38,156 during the years 1967-70, which cast doubt upon their testimony as to the source of the funds, the defense did not exploit this evidence. Instead it resorted to probate records indicating that the estates of Mrs. Glasser's parents had yielded only a few thousand dollars. In this posture the issue was argued to the jury.

After trial, the Glassers' explanation regarding their bank accounts began to unravel. Drawing upon data derived from additional tax records that the government had provided to defense counsel some seven days before the completion of trial, the defense now discovered that during the period 1967-70 the Glassers had deposited a total of $61,659.05, of which approximately $57,000 was in cash. Questioned by government prosecutors, the Glassers acknowledged the falsity of their previous trial testimony concerning the extent of their 1967-70 deposits, but Glasser reaffirmed his testimony concerning defendants' complicity in the payoff scheme. Indeed, Glasser now maintained that a substantial portion of the additional sums represented what he had retained as his share of further, previously undisclosed illegal payoffs from the manufacturers after paying part of these additional payments to the defendants. Accordingly, on May 31, 1974, Judge Pierce denied defendants' motion for a new trial, pointing out:

> "It is far too wide a leap in reason to assert that just because Glasser accumulated $57,000 in cash during the critical time period that, *a fortiori*, a jury hearing these facts could only conclude that he kept the whole of the mere $11,000 he said he gave the defendants."

Judge Pierce concluded that, in view of Glasser's explanation, which implicated the defendants even further in the illegal scheme, it appeared unlikely that the newly-discovered evidence would lead to a different verdict.

In the meantime, the government had commenced its own investigation into the Glassers' financial affairs. After interviewing Glasser and inspecting additional records, the prosecutors on September 12, 1974, informed defense counsel of further discrepancies in Glasser's previous explanation of the source and size of his bank deposits, revealing that Glasser had deposited additional amounts over a longer period of time (1962-1973), and indicating that his dealings with fur manufacturers may have been broader and in larger amounts than he had previously testified. The defendants again moved for a new trial. Again Judge Pierce, on June 4, 1975, denied their motion. Defendants appeal from their convictions and from the denial of their motions for a new trial.

Discussion

At the threshold it must be recognized that in the interest of according finality to a jury's verdict, a motion for a new trial based upon previously-undiscovered evidence is ordinarily "not favored and should be granted only with great caution." *United States* v. *Costello*, 255 F.2d 876, 879 (2d Cir.), *cert. denied*, 357 U.S. 937 (1958); *United States* v. *Sposato*, 446 F.2d 779 (2d Cir. 1971). Indeed, the standard of review governing most instances of newly-discovered evidence, first enunciated in *Berry* v.

Georgia, 10 Ga. 511, 527 (1851), and steadfastly adhered to for over a century, is that the new evidence will not entitle the defendant to a new trial unless "it would probably produce a different verdict." See *United States* v. *De Sapio*, 456 F.2d 644, 647 (2d Cir.), *cert. denied*, 406 U.S. 933 (1972); *United States* v. *Polisi*, 416 F.2d 573, 577 (2d Cir. 1969); 8A Moore's Federal Procedure §33.04(1).

In two categories of cases, however, courts have deviated from this "probability" test and permitted new trials based upon a less exacting demonstration of the new evidence's materiality to the defendant's conviction. One line of cases looks to the existence of prosecutorial culpability in suppressing or failing to disclose the evidence in question; the other turns upon a witness's commission of perjury. As might be anticipated, appellants strive vigorously to fit their case within both categories.

1. *Governmental Culpability.*

The intentional governmental suppression of evidence useful to the defense at trial will mandate a virtual automatic reversal of a criminal conviction. See, e.g., *Moore* v. *Illinois*, 408 U.S. 786, 797-98 (1972); *Giglio* v. *United States*, 405 U.S. 150, 154 (1972); *Napue* v. *Illinois*, 360 U.S. 264, 269 (1959); *United States* v. *Sperling*, 506 F.2d 1323, 1333 (2d Cir. 1974), *cert. denied*, 420 U.S. 962 (1975). This clearly is not such a case, however, as all parties agree that the government had no actual knowledge of the falsity of Glasser's trial testimony.

Appellants argue, however, that the prosecuting attorneys acted negligently in failing to probe more deeply into Glasser's financial affairs. The inadvertent but negligent failure on the part of a prosecutor to furnish to the defense evidence in the prosecutor's control that is of an exculpatory or impeaching nature would loosen the standard of

review relative to newly-discovered evidence and require a reversal if "there was a significant chance that this added item . . . could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction." *United States* v. *Seijo*, 514 F.2d 1357, 1364 (2d Cir. 1975); *United States* v. *Kahn*, 472 F.2d 272, 287 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973); *United States* v. *Miller*, 411 F.2d at 825 (2d Cir. 1969). Furthermore, negligent suppression on the part of the government would run afoul of its independent responsibilities arising under *Brady* v. *Maryland*, 373 U.S. 83 (1963), where the Supreme Court held that "the suppression by the prosecution of evidence favorable to the accused" violates due process "irrespective of the good faith or bad faith of the prosecution." *Id.* at 87.

The government's attorney acknowledged at oral argument that the newly-discovered evidence of Glasser's financial status might have proved useful to both sides at the February trial, offering to each strengths that might have been offset by countervailing weaknesses. But this hindsight appraisal does not dispose of the issue. Cf. *United States* v. *Keogh*, 391 F.2d 138, 148 (2d Cir. 1968). We do not employ the omniscience of a Monday morning quarterback as the standard for determining what investigation should have been made by the government. Although a diligent prosecutor, in the interest of protecting himself against surprise on the part of his principal witness, might well have audited Glasser's finances before putting him on the stand, there was no obligation to do so, since the government, in February 1974, did not have reason to believe that Glasser, blessed with transactional immunity, would have any incentive to engage in falsehoods concerning his own monetary affairs.[6] Indeed, although the government

6 As noted *supra*, trial commenced on February 12, 1974. The defense closed its case on February 26, and the jury announced its verdict on

learned of the Glassers' 1972 federal tax return at the beginning of the trial, it did not have the facts with respect to the contents of the Glassers' savings bank deposits until the trial had been concluded.[7] Thus we cannot say that the government, prior to or during trial, acted unreasonably in failing to recognize the impeachment value of the Glassers' income tax records.[8]

February 27. The Glassers' 1972 federal tax return was made available to defense counsel as of the first day of trial and the government distributed the remaining applicable tax returns on February 20. Defense counsel employed these returns in its cross-examination of Glasser on that same day. In addition, a defense subpoena *duces tecum* served on one of Glassers' savings banks resulted in the production on February 21 of a transcript listing Glasser's deposits during the years 1967-70. The defense did not offer this transcript into evidence during trial.

7 We are unpersuaded by appellants' contention that knowledge of the information in Glasser's returns on file with the Internal Revenue Service should under the circumstances of this case be imputed to the United States Attorney as a basis for declaring that he was negligent in failing to obtain and turn over these returns to the defense. Such a rule, which would obligate the prosecutor to anticipate Glasser's perjury with respect to the source of funds from which the income reported in the tax returns was derived, would be not only extremely burdensome but of doubtful utility. See *United States* v. *Quinn*, 445 F.2d 940, 944 (2d Cir.), *cert. denied*, 404 U.S. 850 (1971). Nothing in the tax returns was inconsistent with Glasser's receipt of the payoffs and sharing of them with the defendants. The 1967-70 tax returns of the Glassers' which the government distributed to defense counsel on February 20, see note 6 *supra*, merely declared additional interest payments from two different savings banks. Indeed defense counsel did not subpoena records of these accounts until April 10.

8 Appellants additionally contend that a looser standard relative to granting a new trial should be applied because the government was at fault in failing, while the first post-trial motion for a new trial was *sub judice*, to disclose that following the motion it had uncovered additional Glasser bank records indicating that the explanations given by Glasser regarding the source of his savings accounts were false. However, the government, having been misled by the earlier Glasser versions, obviously did not want to be accused of furnishing additional misleading records. Accordingly it decided to defer disclosure until it had obtained and confronted Glasser with the *entire* documentary picture, which it promptly assembled and, on September 3, 1974, notified the defense. Under the circumstances, including the fact that the

The facts with respect to the defendant's own diligence in uncovering the newly-discovered evidence are materially different. It must be remembered that

> "a defendant seeking a new trial under any theory must satisfy the court that the material asserted to be newly discovered is in fact such and could not with due diligence have been discovered before or at the latest, at trial." *United States* v. *Costello*, 255 F.2d 866, 879 (2d Cir.), *cert. denied*, 357 U.S. 937 (1958). *Accord, United States* v. *Marquez*, 490 F.2d 1383 (2d Cir. 1974), *aff'g on opinion below*, 363 F. Supp. 802, 803 (S.D.N.Y. 1973), *cert. denied*, 419 U.S. 826 (1974); *United States* v. *Edwards*, 366 F.2d 853, 874 (2d Cir. 1966), *cert. denied*, 386 U.S. 919 (1967).

Here the transcript of the Glassers' account at the East New York Savings Bank, which had been subpoenaed by the defendants on February 13 and was available to them some 12 days before the end of trial, was actually delivered to them six days before the close of the defendant's own case. As Judge Pierce later noted this transcript "was strong evidence that Glasser was not telling the truth" with respect to Mrs. Glasser's inheritance. By recalling the witnesses to the stand, the defense could have used the transcript to recall and cross-examine the Glassers. If more time was needed to obtain additional information from the banks in question, the defense could at least have brought this predicament to the trial judge's attention and requested a continuance in order to exploit further this "strong evidence."

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completion of the trial had eliminated the emergency that would have existed if trial had been pending, we cannot label this conduct as deliberate or negligent nondisclosure calling for application of a different standard of review.

The failure to obtain and exploit the impeaching data until after the jury had rendered its verdict offers strong support for the government's contention that the defense did not exercise due diligence in obtaining the newly-discovered impeaching evidence in time for use at trial. However, the same charge does not lie against the government, for it, unlike the defense, did not during the trial have the East New York Savings Bank transcript in possession. We cannot, therefore, conclude that the government acted unreasonably in failing either to anticipate or prepare to rebut Glasser's perjury.

We conclude, then, that Glasser's perjury is not the product of governmental misconduct justifying application of the looser standards of post-trial review governing such cases.

2. *Glasser's Perjury.*

We turn then to the issue of whether Glasser's perjury itself requires a new trial. While the *Berry* "probability" standard discussed above generally governs challenges to a previous trial based upon newly-discovered evidence, a less stringent test has frequently been voiced in response to revelations of perjury. Under that test, which appears to have had its origin in *Larrison* v. *United States*, 24 F.2d 82, 87 (7th Cir. 1928), a new trial will be granted if, without the false testimony, the jury "might have reached a different conclusion."

Most circuits have expressed their allegiance to *Larrison*.[9] See generally, 8A Moore's Federal Practice §§33.04(1)

9 See, e.g., *United States* v. *Anderson*, 509 F.2d 312, 327 n.105 (D.C. Cir. 1974) (dicta), *cert. denied*, 420 U.S. 991 (1975); *United States* v. *Johnson*, 487 F.2d 1278, 1279 (4th Cir. 1973) (government witness recanted testimony); *United States* v. *Meyers*, 484 F.2d 113, 116 (3d Cir. 1973) (applying *Larrison* to perjury by material witness); *United States* v. *Briola*, 465 F.2d 1018, 1022 (10th Cir. 1972), *cert. denied*, 409

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& 33.06(1). In recent years, however, we have expressed increasing discomfort with the *Larrison* test in cases that do not involve prosecutorial misconduct, see, e.g., *United States* v. *Rosner*, 516 F.2d 269, 279 (2d Cir. 1975); *United States* v. *Marquez*, 363 F. Supp. 802, 806 (S.D.N.Y. 1973) (Weinfeld, *J.*), *aff'd on opinion below*, 490 F.2d 1383 (2d Cir.), *cert. denied*, 419 U.S. 826 (1974); *United States* v. *De Sapio*, 435 F.2d 272, 286 n.14 (2d Cir. 1970), *cert. denied*, 402 U.S. 999 (1971). This trend no doubt reflects our realization that the test, if literally applied, should require reversal in cases of perjury with respect to even minor matters, especially in light of the standard jury instruction that upon finding that a witness had deliberately proffered false testimony in part, the jury may disregard his entire testimony. Thus, once it is shown that a material witness has intentionally lied with respect to any matter, it is difficult to deny that the jury, had it known of the lie, "might" have acquitted. We recognize that those who have professed adherence to the *Larrison* test do not appear to share our concern over the problems arising from its speculative nature. Indeed, notwithstanding the looseness of the test, most courts have not hesitated to deny new trials in cases where they have purported to apply it.[10] However, rather

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U.S. 1108 (1973); *United States* v. *Curran*, 465 F.2d 260, 264 (7th Cir. 1972) (dicta); *United States* v. *Strauss*, 443 F.2d 986, 989 (1st Cir.), *cert. denied*, 404 U.S. 851 (1971); *United States* v. *Smith*, 433 F.2d 149, 151 (5th Cir. 1970).

10 The decisions cited in note 9 *supra* reveal that frequently the courts circumvent the *Larrison* test by failing to recognize that the trial testimony was perjurious or had been recanted, see, *e.g.*, *United States* v. *Johnson*, *supra*, 487 F.2d at 1279; *United States* v. *Strauss*, *supra*, 443 F.2d at 990, or by simply concluding that the *Larrison* standard remains unsatisfied. Thus, of the cases listed in note 9 in which the courts expressed their adherence to *Larrison*, only one reversed a conviction based upon subsequently-discovered evidence, see *United States* v. *Meyers*, *supra*, and even in that case the court concluded that the perjury was so serious that it would have called for a retrial under *either Berry* or *Larrison*, 484 F.2d at 117.

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than adopt the *Larrison* test and violate it in application, we believe, for the reasons indicated, that the time-honored "probability" standard is the more appropriate one for determining whether perjury calls for a new trial. In addition to its other virtues the rule enables a court to act forthrightly in making its determination.

Defendants rely heavily upon *Mesarosh* v. *United States*, 352 U.S. 1 (1956), in urging upon us a more lenient standard of review in cases where a new trial is sought on grounds of perjury. But this court has noted that *Mesarosh* is a *sui generis* case, *United States* v. *Zane*, 507 F.2d 346, 348 (2d Cir. 1974), *cert. denied*, 421 U.S. 910 (1975), involving "that rare situation where a key witness . . . had been conceded by the Government to have testified . . . in such a bizarre fashion as to raise the inference that he was either an inveterate perjurer or a disordered mind." *United States* v. *Rosner*, *supra*, 516 F.2d at 279-80. Moreover, we are confident that such an incredible witness would not have survived the scrutiny of *any* standard of post-trial review, including a proper application of the "probability" test endorsed by us.

Another problem that does not appear to have been the subject of explicit reported judicial consideration, at least in this circuit, is whether, in considering a motion for a new trial on grounds of perjury, the court should assume that the jury would have had before it the newly-discovered evidence not only for its probative value with respect to the issues but also to demonstrate that the witness had perjured himself with respect to that evidence, the latter being pertinent, of course, for its impeaching value. Put another way, should we, in determining whether truthful testimony by the witness would probably have changed the jury's verdict, also assume that the jury would have known that he had lied under oath about the matter?

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Since the witness's credibility could very well have been a factor of central importance to the jury, indeed every bit as important as the factual elements of the crime itself, see *Giglio* v. *United States, supra,* 405 U.S. at 154; *Napue* v. *Illinois, supra,* 360 U.S. at 269; *United States* v. *Seijo, supra,* 514 F.2d at 1363-64, we would answer this question in the affirmative. Upon discovery of previous trial perjury by a government witness, the court should decide whether the jury probably would have altered its verdict if it had had the opportunity to appraise the impact of the newly-discovered evidence not only upon the factual elements of the government's case but also upon the credibility of the government's witness.

Applying the foregoing, we do not believe that the revelation of Glasser's perjury would have altered the jury's verdict. The new evidence of the Glassers' bloated bank accounts is not exculpatory in nature. Glasser's receipt of monies from at least six fur manufacturers was clearly established. It is a *non sequitur* to suggest that the discovery of Glasser's receipt of larger sums of money from some source establishes that he did not pass to defendants a share of what he concededly received from the fur manufacturers. The key factual issue in dispute—whether Glasser shared payments with the defendants—would not have been affected one way or the other by this new evidence. The newly-discovered bank records, furthermore, are too general in nature to permit substantiation of the defense's theory by tracing funds from the manufacturers' hands into Glasser's exclusive coffers.[11] Moreover, since

11 At oral argument, it became clear that the dates of deposits and sums of money included on the newly-discovered bank statements cannot with any reasonable degree of precision be interrelated with the timing and size of payoffs flowing from the manufacturers to Glasser. Thus, the defense theory that Glasser retained all of the proceeds—obviously once rejected by the jury—still cannot be adequately substantiated.

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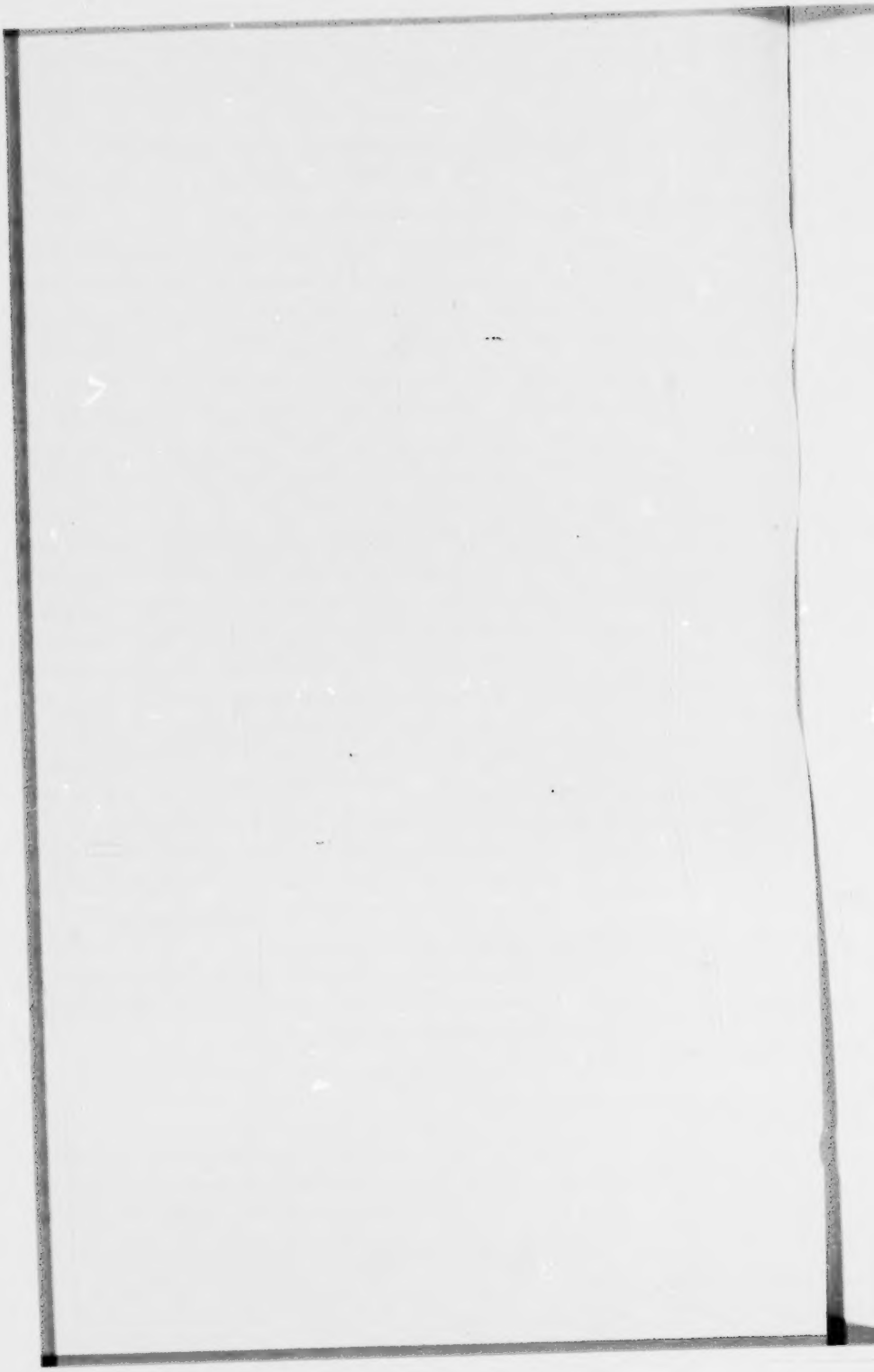
Glasser now claims that the defendants also received their shares of these additional payoffs, it is doubtful whether defense counsel, equipped with this new information, would find it beneficial to open the door to this evidence of possible further union corruption. Without necessarily assuming the trustworthiness of Glasser's post-trial explanation, which incriminated the defendants even further than did his trial testimony, the fact remains that, if the defense explored this territory, it would face the serious risk that a jury would be even less likely to discredit Glasser's testimony despite his earlier perjury. Although the revelation of his perjury would have impeached his credibility, this aspect of his testimony could be sensibly explained: despite the grant of immunity protecting him from criminal responsibility, he still was confronted with the risk that if he disclosed the true source of his hidden wealth to the government he would be subjected to civil income tax liability, which would deplete his resources as a retiree. Thus the impeaching value of the disclosure was of doubtful value to the defense as compared with the harm that might result to the defendants by Glasser's explanation.

In sum, balancing the potential damage to Glasser's credibility against the possibility that the new proof simply would be construed as evidence of a more widespread bribery scheme than previously recognized, we cannot say that disclosure of Glasser's perjury "probably" would have produced a different verdict.

3. *Miscellaneous*

The melange of other contentions advanced by appellants fails to disclose any with sufficient merit to warrant reversal. We limit ourselves to those arguments upon which they appear to have placed their greatest reliance.



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Crime Control Act of 1970 and notified the grand jury that its term could be extended beyond 18 months for periods of 6 months up to a maximum of 36 months. He further informed the grand jury that it had additional powers not normally conferred upon grand juries. Thereafter the term of the grand jury was extended by orders of the district court beyond the 18-month period pursuant to 18 U.S.C. §3331(a). It is clear that Judge Sugarman's order, viewed in context, was intended to and was issued pursuant to the terms of the Organized Crime Control Act of 1970.

Defendants' next contention—that the evidence showed a number of separate conspiracies rather than the one single conspiracy charged in the indictment—must likewise be rejected. The evidence established a continuous course of conduct in which a number of fur manufacturers, acting through Glasser as middleman, engaged in the corruption of the defendants as key members of the Union. Each of the defendants appreciated that the illegal arrangements and payoffs to which he was a party were part of this ongoing scheme involving others. As responsible officials of the Union, appellants shared interrelated duties and worked closely together. Their participation over a period of time in the corrupt scheme was evidenced by numerous acts, including the joint approval by Stofsky and Gold of Grossman's violations of the Union agreement, the involvement of Hoff in the same violations, the association of each defendant with payoffs made by more than one fur manufacturer,[12] Gold's statements to Grossman indicating knowledge of payoffs by others, the joint determination of Hoff and Lageoles not to prosecute certain contracting com-

12 Gold was shown to have received payoffs from six fur manufacturers, Hoff from four, Lageolis from two and Stofsky from one. Stofsky also authorized Grossman's violations and participated in the decision not to prosecute Ginsberg's firm.

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plaints or to conduct the examination of certain fur manufacturers' books, and the efforts of Stofsky and Gold to induce Glasser not to give any harmful evidence when he came under federal investigation. Viewed in toto the evidence was more than sufficient to establish one single conspiracy. See, e.g., *United States* v. *Santana*, 503 F.2d 710 (2d Cir.), *cert. denied*, 419 U.S. 1053 (1974); *United States* v. *Salazar*, 485 F.2d 1272 (2d Cir. 1973), *cert. denied*, 415 U.S. 985 (1974); *United States* v. *Edwards*, *supra*, 366 F.2d at 867; *United States* v. *Agueci*, 310 F.2d 817 (2d Cir. 1962), *cert. denied*, 372 U.S. 959 (1963). Evidence regarding Glasser's payments to Jaffee, which were in furtherance of the conspiracy, was properly admitted, *United States* v. *Bynum*, 485 F.2d 490, 498 (2d Cir. 1973), *vacated and remanded on other grounds*, 417 U.S. 943 (1974), as was Glasser's testimony regarding fur manufacturers' overtures to enter the illegal payoff arrangements in exchange for permission to violate the Union agreement's contracting prohibition, see *United States* v. *Geaney*, 417 F.2d 1116 (2d Cir. 1969), *cert. denied sub nom. Lynch* v. *United States*, 397 U.S. 1028 (1970); *United States* v. *Wiley*, 519 F.2d 1348 (2d Cir. 1975).

Appellants next object to the prosecutor's comments in summation to the effect that, although the fur manufacturers from whom Glasser testified that he had received payoffs had not been called by the government, they were available for subpoena by the defendants to testify at trial. Since the defense had opened the door in this regard by suggesting in summation, notwithstanding efforts by the prosecutor to obtain a directive that neither side be permitted to comment on the subject, that an inference adverse to the government might be drawn from the government's failure to introduce these witnesses, the prosecutor's argument was not improper. See *United States* v. *Deutsch*, 451

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F.2d 98, 116-17 (2d Cir. 1971), *cert. denied*, 404 U.S. 1019 (1972). Nor was the government obligated to grant immunity to the fur manufacturers so that they could be called to testify. See *Morrison* v. *United States*, 365 F.2d 521, 524 (D.C. Cir. 1966); *United States* v. *Bautista*, 509 F.2d 675, 677-78 (9th Cir. 1975).

The record discloses ample evidence of payoffs which, viewed in the light most favorable to the government, support the convictions of Stofsky, Hoff and Gold for income tax evasion in violation of 26 U.S.C. §7201. The failure of the government to afford them an administrative conference with the IRS before indictment did not nullify the grand jury's actions. The grand jury's broad powers to investigate and to indict on the basis of evidence which disclosed reasonable grounds for belief that the defendants violated 26 U.S.C. §7201, are not conditioned upon the taxpayers being given an opportunity to explain their conduct to a government official any more than to the grand jury itself. See *United States* v. *Daly*, 481 F.2d 28, 30-31 (8th Cir.), *cert. denied*, 414 U.S. 1064 (1973); *United States* v. *Goldstein*, 342 F. Supp. 661 (E.D.N.Y. 1972). Furthermore, the IRS regulation providing for such administrative conferences, 26 C.F.R. §601.107(b)(2), was not in effect at the time of the filing of the indictment.

Similarly a sufficient evidentiary basis existed to support the convictions of Stofsky and Gold for obstruction of justice in violation of 18 U.S.C. §1503. Their conduct went beyond merely suggesting to Glasser that he had the right to invoke the Fifth Amendment. The trial judge, furthermore, instructed the jury that such advice would be insufficient to provide the necessary corrupt intent. In addition, the evidence established a concerted effort corruptly to persuade Glasser to remain silent in order to conceal the conspiracy and the payoffs. This proof was plainly sufficient.

See *United States* v. *Cioffi*, 493 F.2d 1111, 1118-19 (2d Cir.), *cert. denied*, 419 U.S. 917 (1974).

We have examined the other grounds urged by appellants for reversal and find them meritless.

The convictions are affirmed.

APPENDIX C

Endorsement Order of District Court Denying First Motion for New Trial, *United States* v. *Schwartzbaum*

ENDORSEMENT ORDER

The motion herein for a new trial based on allegedly newly discovered evidence is hereby denied. The reasons for the denial are substantially those contained in a Memorandum Opinion filed by this Court on June 12, 1974 denying a similar motion in *United States* v. *Stofsky et al.*, 73 Cr. 614. Moreover, in this Court's view, the defendant has failed to satisfy the threshold requirement of demonstrating that the purported newly discovered evidence could not have been with due diligence discovered either before the trial or at the latest at the trial.

Defendant's request that this Court reconsider its first motion for a new trial in light of the allegedly newly discovered evidence is also denied.

SO ORDERED.

Dated: New York, New York
June 24, 1974

/s/ L. W. PIERCE
LAWRENCE W. PIERCE
U.S.D.J.

APPENDIX D

Opinion of District Court Denying First Motion for New Trial, *United States* v. *Stofsky*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

73 Cr. 614

UNITED STATES OF AMERICA,

—v.—

GEORGE STOFSKY, et al.,

Defendants.

APPEARANCES:

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APPENDIX D—Opinion of District Court Denying First Motion for New Trial, United States v. *Stofsky*

LAWRENCE W. PIERCE, D.J.

MEMORANDUM OPINION

After a two and one-half week trial ending February 28, 1974, defendants Stofsky, Hoff, Gold and Lageoles, officials of the Furriers' Joint Council, a labor union, were convicted by a jury of accepting pay-offs from fur manufacturers and of other federal crimes related to the pay-off scheme. They have moved for a new trial pursuant to Fed.R.Crim.P. 33, citing newly-discovered evidence concerning the personal finances of one of the government's chief witnesses, which directly controverts the witness' testimony at trial with respect to the source of his small fortune. Defendants assert two theories in support of the motion: first, that the new evidence conclusively establishes that the convictions were based on perjured testimony, mandating a new trial; and, second, that the government had a duty to discover the true state of the witness' finances and to disclose it, and that its failure to do so requires a new trial. For the reasons set forth below, the motion is denied.

Background

The jury trial commenced on February 11, 1974. The indictment charged that the defendants accepted a continuing flow of pay-offs during 1967 through 1970 from certain fur manufacturers in return for permission to circumvent terms of the union contract prohibiting overtime and subcontracting. The government presented three witnesses who testified as to the pay-offs. Two were manufacturers who said they made payments directly to Stofsky and Gold. The third was Jack Glasser, a former labor adjuster for the trade association which represented the manufacturers who were parties to the

contract with the union. Glasser's testimony, given under the umbrella of transactional immunity, was that he served as an intermediary, negotiating the amount and frequency of the payments, collecting the money from the manufacturers involved, and delivering the cash payments to various of the four defendants, keeping a share for himself. He testified that altogether the scheme involved a total of around $16,000, of which he kept about $5,000. He also testified that he never banked his share, but simply spent it as he received it.

There was testimony at the trial with respect to the fur garment industry in New York City which tended to provide a circumstantial background in support of Glasser's story. The jury heard that the industry is relatively small and contained geographically; that its labor requirements are seasonal; that the union's contract protects workers by requiring extensive benefits from the manufacturers, and by forbidding manufacturers to meet their excess labor needs with overtime or subcontracts to non-union shops. The defendants introduced some evidence to the contrary, but the jury could have reasonably concluded that the contract created a hardship for some manufacturers who sought ways to circumvent it. From that premise the jury could have reasonably inferred that if the manufacturers would pay-off anyone for protection against union enforcement, it would be union officials charged with enforcement.

Both in the trial at issue here, and in proceedings involving a related indictment against manufacturers charged with making the pay-offs, 73 Cr. 616, there was ample corroboration of Glasser's testimony that the manufacturers did violate the contract and that they paid the money to Glasser for that privilege with the assumption that it was going to union officials. This critical assumption was circumstantially supported by evidence that these

particular manufacturers suffered little union trouble during the period when they were breaking the contract and making the pay-offs. But, aside from the circumstantial evidence as to the nature of the industry and the payees' lack of union problems, Glasser's testimony with respect to his subsequent payments to these defendant union officials was virtually uncorroborated. In fact, Glasser testified that no payment was ever witnessed. He said he merely carried the cash around until he encountered the designated official to whom he would palm the payment, whispering the name of the manufacturer involved.

Altogether, in the trial of the union officials, seventeen substantive counts involving payments to these defendants went to the jury. Six counts involved payments unrelated to Glasser and were supported by the testimony of two manufacturers who made direct payments to two of the four defendants. Ten counts rested entirely on Glasser's testimony. One count was partially supported by the testimony of the manufacturer involved who said that he paid Glasser, but did not have actual knowledge of Glasser's payment to the intended union official. Likewise, the three manufacturers who pleaded guilty to Indictment 73 Cr. 616, disavowed any actual knowledge of Glasser's subsequent transmission of their payment to union officials.

And therein lies the crux of both the theory of defense adopted by the four union officials at trial and of their motion for a new trial.

The defense attempted to develop at trial that although Glasser might have taken the payments from the manufacturers, and even had led them to believe he was using the cash to pay-off union officials on their behalf, he was in fact pocketing all of the money given to him by the manufacturers. The theory held that Glasser's

scheme was viable because the union had a small enforcement staff incapable of catching more than a handful of contract violations under any circumstances. Thus, the defendants posited, Glasser "conned" the manufacturers into believing that pay-offs were necessary to fend off the union, and counted on the inability of the union to police the contract to give his scheme the appearance of continuing credibility.

Glasser was motivated to lie about the payments to union officials, defendants asserted, by his desire to avoid federal prosecution and his bitterness over loss of his pension benefits when he was terminated by the trade association for whom he worked.

Apparently in pursuit of these lines of defense, just prior to the opening of the trial, defendants subpoenaed Glasser's federal income tax returns for the years 1967 through 1972. Glasser claimed all had been destroyed except his 1972 return which he produced. It revealed a large interest income, the bulk from the East New York Savings Bank. During cross-examination on February 13, 1974, defense counsel, using the 1972 return, elicited testimony from Glasser that his personal wealth totalled some $120,000. On further questioning he said the money was chiefly from his wife's inheritance of many years ago. On that same date, defendants subpoenaed the East New York Savings Bank's records of the Glassers' account, and moved orally for production of the remaining returns. The Court requested an offer of proof.

On February 15, 1974, following a showing which focused more on impeaching possibilities than on substantive matters, this Court granted defendants' demand for production of the remaining original returns from the IRS files. With the cooperation of the government and Glasser, the order was expedited and the returns produced on February 20, 1974. The East New York Sav-

ings Bank records were produced at the latest on February 21, 1974, and revealed that the Glassers had deposited $38,000 in savings accounts there during the years 1967 through 1970, the period of the pay-off scheme.

Defendants commenced presentation of their case on February 21, 1974. They rested on February 26, 1974, without recalling Glasser, without a request for a continuance and with little if any reference to Glasser's bank accounts or income tax returns. They did produce probate records which suggested that Mrs. Glasser's inheritance was not anywhere near the size of the $120,000 nest-egg about which Glasser had testified. On summation, defense counsel vigorously attacked Glasser's credibility, using among other items, the probate records and the revelations from the 1972 tax returns. He fully set forth the defense theory. As noted above, after due deliberation the jury convicted on all counts submitted to it.

The New Evidence

On April 22, 1974, having requested an adjournment of sentence for post-trial preparation, defendants filed this motion. It asserts that since March 7, 1974, when they first received the actual deposit slips from the East New York Savings Bank, the defendants have discovered that during 1967 through 1970, the Glassers deposited some $57,000 in a series of frequent cash transactions in three separate New York banks: the previously noted $38,000 in the East New York Savings Bank; $12,500 in the Greenwich Savings Bank; and $7,300 in the Emigrant Savings Bank.

On May 24, 1974, the government having requested an adjournment of sentence in order to prepare a response, filed extensive papers in opposition to the motion. The government's affidavit states that the Assistant

APPENDIX D—Opinion of District Court Denying First Motion for New Trial, United States v. *Stofsky*

United States Attorney responsible for the prosecution interviewed Jack Glasser and his wife on May 3, 6, 13, and 14, 1974. During the course of these interviews the Glassers revealed to the government for the first time that they had received cash funds from a variety of sources during the period of time in question. These sources included, according to Glasser, his share of illegal payments to union officials far beyond the scope of the scheme Glasser had previously described to the government or to the jury.

Glasser stated that his share of these additional payments was around $7,000 for each of the years in question. The rest of the $57,000 was explained by the sale of jewelry; Christmas gifts from manufacturers; wholesale commissions; vacation gifts from manufacturers overtime committee payments and miscellaneous commissions. Other errors in trial testimony by both Glasser and his wife were attributed to failure to understand the questions put by counsel.

In addition to the affidavit just described, the government has also filed an *in camera* submission consisting of a government file memorandum on the discussions with the Glassers. It differs, in the main, from the public affidavit in its detail with respect to the additional illegal pay-offs, setting forth names, dates and circumstances involved in each, as related by Glasser. The government has requested that such document be sealed and made a part of the record in this case, asserting that disclosure at this juncture would seriously compromise future government investigations. In the Court's view this is a well-founded request and the document has been sealed by Order of the Court dated June 6, 1974. However, it is appropriate at this time to disclose to defense counsel that the sealed affidavit reveals that Glasser now says he

originally told the government only of payments from manufacturers to union officials which he had reason to believe the government already knew about; and that at the recent interviews, he and his wife initially told the government that the cash deposits could be explained, in total, by jewelry sales. These additional facts as they bear on Glasser's credibility have been taken into account here.

Thus, since trial, the following evidence has been developed:

1. Glasser made a series of cash deposits totalling more than $57,000 during the period of the pay-off scheme. This directly contradicts his trial testimony that most of his $120,000 fortune came from his wife's inheritance some years ago.

2. Glasser has explained the source of the $57,000, by stating that at least $20,000 of it represents his share of even more pay-offs during the critical period. This directly contradicts his trial testimony that the scheme totalled $16,000 and his share totalled $5,000, and that he never banked any of it. But in the process it further implicates the defendants in the scheme for which they have been convicted.

The government does not contest the veracity of the defendants' documentary evidence, and concedes that Glasser's testimony about these matters was false in many respects.

The Court concludes that a government witness has engaged in an effort to conceal information, and has given false, or deliberately misleading testimony with respect to the source of his savings.

But, new evidence revealing that a witness has testified falsely as to some matters, standing alone, is not

enough to mandate a new trial. Before this Court can proceed to the merits, the defendants must show that "the material asserted to be newly discovered is in fact such and could not with due diligence have been discovered [by them] before or, at the latest, at trial." *United States* v. *Costello*, 255 F.2d 876, 879 (2d Cir.), *cert. denied*, 357 U.S. 937 (1958). Then, the ultimate result depends upon analysis of the new evidence and the false testimony, and the materiality of both. The standard of materiality required, in turn, depends upon the degree to which the government can be said to have been involved in the suppression, if any, of the evidence or responsible for the false testimony.

Due Diligence of Defendants

In retrospect, it would appear that the key to the "new" facts was in defense counsel's hands from the moment Glasser was cross-examined about his 1972 tax return early in the trial, or at the latest when counsel finally viewed the transcript of the East New York Savings Bank accounts on February 21, 1974, and saw that $38,000 (almost a third of what Glasser had earlier told him represented the total Glasser fortune) had been deposited in frequent transactions from 1967 through 1970. While at that time counsel did not know that the deposits were cash, it was still strong evidence that Glasser was not telling the truth with respect to the inheritance. But, this Court is not prepared to say that trial counsel in a complex, demanding case is bound to turn every key at precisely the right moment in order to meet the requirements for a new trial motion. Cf. *United States* v. *Keogh*, 391 F.2d 138, 147 (2d Cir. 1968). Nor does this Court believe that counsel's inadvertence was deliberate trial strategy as the government suggests. It is conceivable,

of course, that counsel veered away from further direct inquiry with respect to Glasser's wealth, fearful of eliciting before the jury the damaging explanation which Glasser has now given. But, if that were the case, the probate records which counsel did introduce on the same issue presented somewhat the same risk.

In any event, the issue of due diligence is close enough, and the matter of Glasser's performance serious enough, that a resolution on the merits appears to be appropriate and necessary.

The Government's Duty

There are a multitude of standards current in the law for testing the merits of a new trial motion. They range from the very liberal, where a defendant need show only that with the new evidence, or without the falsehoods, the jury in the case already tried "might not have convicted";[1] to the very strict, where the defendant must show that with the new evidence, or without the falsehoods, a jury on a retrial would "probably reach a dif-

[1] This liberal test is a modification of the classic test set forth in *Larrison* v. *United States*, 24 F.2d 82, 87 (7th Cir. 1928), which involves a post-trial revelation that a conviction was based on false testimony. See *United States* v. *Polisi*, 416 F.2d 573, 577 (2d Cir. 1969). This test has apparently been limited to cases involving prosecutorial misconduct in this Circuit. *United States* v. *DeSapio*, 435 F.2d 272, 286 n.14 (2d Cir. 1970), *cert. denied*, 402 U.S. 999 (1971). It is also a variation of the applicable test for negligent nondisclosure of evidence which was in the government's possession, as set forth in *United States* v. *Houle*, 490 F.2d 167, 170 (2d Cir. 1973), which requires an assessment of ". . . whether . . . there was a significant chance that this added item, developed by skilled counsel . . . could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction."

ferent verdict." [2] In large part, the standard to be applied depends upon whether the defendant can show that the government is somehow responsible for false testimony, or that it negligently failed to disclose evidence, or that it deliberately suppressed evidence.[3]

The defendants here do not contend that the government instigated Glasser's false testimony, or that the government knew Glasser's testimony to be false. They do not argue that the government possessed the cash deposit slips and deliberately, or negligently suppressed them. Instead, they assert that the government possessed Glasser's federal tax returns, and that under the circumstances the prosecutor should have recognized their high value to the defense and turned them over to the defendants pursuant to the principles of *Brady* v. *Maryland*, 373 U.S. 83 (1963). More generally, characterizing the state of Glasser's finances as a central issue in the case, defendants urge that the government had an obligation to

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[2] The strict standard is reserved for motions which can be viewed simply as based on newly discovered evidence and free from prosecutorial misconduct. See, e.g., *United States* v. *DeSapio, supra; United States* v. *DeSapio*, 456 F.2d 644, 647 (2d Cir.), *cert. denied*, 406 U.S. 933 (1972).

[3] Where the reliability of a given witness might well be determinative of guilt or innocence, and where the government had in its possession information which demonstrated that the witness had not told the truth on the stand, and did not turn it over to defendant pursuant to *Brady* v. *Maryland*, 373 U.S. 83 (1963), the Supreme Court has said that "[a] new trial is required if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . .'" *Giglio* v. *United States*, 405 U.S. 150, 154 (1972), citing, *Napue* v. *Illinois*, 360 U.S. 264, 271 (1959). Or put another way, as it has been by the Second Circuit in *United States* v. *Mele*, 462 F.2d 918, 924 (2d Cir. 1972), the standard under *Giglio* is "whether the evidence is material and could in any reasonable likelihood have led to a different result on retrial."

conduct a pre-trial investigation of Glasser's veracity with respect to these matters irrespective of what it possessed or did not possess. For the latter proposition, the defendants invoke *Brady* but cite only *People* v. *Maynard* (Sup. Ct. N.Y. Cty.), N.Y.L.J., Vol. 171, No. 64, p. 18, col. 7, April 3, 1974.

That Glasser's financial position and thus his underlying records could be seen as relevant to this case is not a wholely frivolous proposition. The state of a key witness' finances was said to be something "the prosecutors properly required . . . to be investigated" in *United States* v. *Keogh, supra*, 391 F.2d at 142, in a case involving precisely the same theory of defense as defendants have asserted here. But neither this dictum in *Keogh*, or *Brady*, or any other authoritative case cited by defendants requires such an investigation. The requirement is that the prosecution must disclose exculpatory information in its possession. It is from possession, however buried, forgotten or overlooked, that the prosecution's obligation arises.

The defendants say that the "government" possessed Glasser's tax returns. They offer no support for that assertion, and it would appear that what they mean is that the "government at large" possessed the returns on file with the Internal Revenue Service. Given the strong public policy with respect to secrecy of federal income tax returns, this Court declines to hold that the tax returns are in the constructive possession of the prosecutor merely because they are on file with the IRS.

Furthermore, even if the government had possessed Glasser's tax returns, it is not at all certain that the value to the defendants of these documents would have flagged the prosecutor's attention sufficiently to require him to turn them over. Of course, it is easy now to point out that he would have seen the size of Glasser's interest

income, and surmised the size of Glasser's small fortune. In hindsight, mainly because Glasser lied about the source of the savings on the stand, this information is perceived as of some value to the defendants. But, its practical materiality is still highly questionable and in this Court's view it is not of such a nature as to have mandated pretrial disclosure. The Court is not persuaded by the government's argument that it would violate public policy to provide such information to the defendants, under any circumstances. If the returns had been possessed, and if the portion with respect to savings interest had alerted the prosecutor, the returns themselves need not have been turned over in order to have provided the information. Further, it should be noted that tax returns are not entirely sacrosanct, once a proper showing has been made to a Court, as demonstrated by this Court's order to produce them during trial. In that light, it is perhaps noteworthy that defendants' trial demand contained the first showing in this proceeding of the importance of this issue to the defense. Their pro forma discovery motion for Glasser's "bank statements, bank book, diaries, notes, memoranda, and other relevant documents . . ." (Defs' Motion for Discovery, ¶ 8 July 18, 1973) did not include tax returns, and was denied by the Court as entirely unsupported.

The Standard

Having found no prosecutorial misconduct, this Court is of the view that the applicable test is the formulation set forth in *United States* v. *DeSapio*, 435 F.2d 272, 286 (2d Cir. 1970), *cert. denied*, 402 U.S. 999 (1971), and reiterated in a line of cases, including *United States* v. *DeSapio*, 456 F.2d 644, 647 (2d Cir.), *cert. denied*, 406 U.S. 933 (1972): Is the evidence of such a nature that

it would "probably produce a different verdict in the event of a retrial."

But, the government has suggested a test more liberal to the defendants, as set forth in *United States* v. *Marquez*, 363 F. Supp. 802, 806 (S.D.N.Y. 1973), *aff'd without opinion*, 489 F.2d 753 (2d Cir. 1974), to wit: Would the new evidence, or the lack of the perjured testimony "have produced a different verdict [at the completed trial]." [4] Inasmuch as the result is the same under either test, the Court will apply both.

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[4] Actually, the government has suggested that ". . . the defendant must establish that the testimony was of such a character that it probably would have produced a different *conclusion*" (emphasis added). Gov't Memo in Opposition to Motion for a New Trial, p. 14. Presumably, the government means a "different conclusion" at the trial just completed.

Although the present state of law is not a model of clarity, the government's proposal strikes this Court as more liberal than required, for two reasons. First, the oft-cited footnote in *United States* v. *DeSapio*, 435 F.2d at 286 n.14, seems to indicate that unless there has been prosecutorial misconduct shown, the analysis need not look to the probable effect of the new evidence had it been available in the past trial, but only to whether it would probably affect the result at a new trial. This is important in this case because Glasser's present explanation renders the new evidence worthless, as a practical matter, at any retrial. The new evidence could have been used with maximum impact only at the past trial.

Second, the government has said that the new evidence need lead only to a different "conclusion" not a "different verdict." Both *DeSapio* and *Marquez* require only the latter. In a close case, the difference between "conclusion" or "result" and "verdict" is critical. For instance, in this case it is extremely doubtful that the new evidence would precipitate a "different verdict," that is, an acquittal, in retrial or the trial just past. But, it is quite possible that it might have swayed at least one juror in the past trial, and thus resulted in a mistrial. That would have been a "different conclusion" as this Court interprets the word.

APPENDIX D—Opinion of District Court Denying First Motion for New Trial, United States v. *Stofsky*

Discussion

The new evidence produced by the defendants demonstrates that Glasser lied about the source of his savings, and it affirmatively shows that a portion of those savings has been recently deposited in cash.

The defendants do not seriously argue that it is *this* false testimony, or that it is the failure to state *this* "truth" about the cash deposits, which convicted the defendants. Standing alone, these matters are collateral to the elements of the offenses charged against these defendants. Instead, they seek to elevate the collateral to a level of materiality by asserting that "the source of these cash deposits could be explained only by concluding that Glasser perjured himself when he testified that he gave any of the monies to one or more of the defendants." Thus, they contend that the new evidence establishes that Glasser lied about what is, without doubt, the most material portion of his testimony. The new evidence establishes no such proposition. It does not directly address Glasser's testimony with respect to payments to the defendants, nor does it lead inevitably to the conclusion that Glasser lied about the pay-offs to the defendants. It is far too wide a leap in reason to assert that just because Glasser accumulated $57,000 in cash during the critical time period that, *a fortiori*, a jury hearing these facts could only conclude that he kept the whole of the mere $11,000 he said he gave the defendants. On the contrary, the figures alone are so incongruous as to lead to no conclusion at all.

The defendants themselves, in other portions of their papers, state the wholely sensible premise that this new evidence "would indicate to a jury that there were much larger payments and/or payments from many additional sources." Even without Glasser's subsequent explana-

tion, these two inferences of other or larger payments, or both, could have occurred to the jury, and would not have necessarily or "probably" produced a different verdict. Applying the stricter test of probable effect at a new trial, it is likely as the matter has evolved to the present, complete with Glasser's explanation inculpating the defendants, that no defense counsel would actually attempt to use the evidence of the cash deposits as substantive support for the defendants' theory. The risk inherent in exposing the jury to Glasser's damaging explanation would be great.

The defendants also suggest that this evidence can be viewed as capable of destroying the credibility of Glasser solely because it shows him to have lied about the source of his funds. Under the strict test, it is still doubtful that it would produce a different verdict on a retrial. Glasser would not obligingly repeat his earlier false testimony just to provide defense counsel with the opportunity to impeach him with this new evidence. The government could not permit it in any event. It is possible, of course, that counsel could attempt to exploit this entire episode so as to seriously damage Glasser's credibility, but, again, it is difficult to imagine how it might be done without raising the spectre of a far wider, broader scheme involving these defendants.

Under all of the circumstances, the strongest argument the defendants advance is the probable impeaching effect of the new evidence, if it had been produced at precisely the right moment at the trial just concluded. That "right" moment could only have been after Glasser had testified falsely on the subject. Then, the question is, would proof that he had lied about his savings have dealt a blow to his credibility so serious as to have probably led the jury to totally discard his testimony with respect to payments to the union officials?

APPENDIX D—Opinion of District Court Denying First Motion for New Trial, United States v. *Stofsky*

Assessment of a jury's view of credibility is speculative at best. But several factors lead this Court to conclude that this evidence would not have destroyed Glasser to the extent that the verdict of the jury would have been different. As it was, the jury had evidence from the probate records which established that the inheritance story was not true. And although that evidence did not supply the jury with an explanation of where the money did come from, it must have demonstrated that Glasser had not told the truth about the source of the $120,000. There is no doubt that evidence of the recent cash deposits would have had a dramatic impact. But, in this Court's view, it would not have changed the quantum of the impeaching effect.

In addition, the jury had totally independent evidence to support Glasser's story which would have remained unsullied. Two manufacturers had testified as to direct payments made to some of these defendants. One manufacturer had testified that he gave money to Glasser with the understanding that it was going to union officials. A non-defendant ex-union official had testified that he accepted money from Glasser under similar circumstances. Also the jury heard evidence of the small and tightly circumscribed fur industry from which they might well have reasoned that the story Glasser told made sense, however untruthful he had been about the source of his fortune. Further, the jury could have reasoned from the same industry evidence that the basic flaw in the defense theory was that if Glasser knew the union lacked the manpower to enforce the contract, then all of the manufacturers must have also known. Put another way, it was reasonable for the jury to conclude that the manufacturers would not have continued to pay Glasser during a period of at least three years, unless they knew that it

was necessary to pay-off union officials in order to circumvent the contract, and they were convinced that he was, in fact, so doing with their money.

Given all of these factors, this Court cannot conclude that if the jury in the trial just completed had known of this new evidence of cash deposits, or the fact that Glasser lied about the source of his savings, it would probably have reached a different verdict, an acquittal; or that this new evidence would probably produce an acquittal on retrial.

The motion for a new trial is hereby denied. The defendants' accompanying motion for a judgment of acquittal pursuant to Fed. R. Crim. P. 29(c), is hereby denied.

SO ORDERED.

Dated: New York, New York
June 12, 1974

LAWRENCE W. PIERCE
U. S. D. J.

APPENDIX E

Endorsement Order of District Court Denying Second Motion for New Trial, *United States* v. *Schwartzbaum*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

73 Cr. 616

UNITED STATES OF AMERICA

—v.—

KARL SCHWARTZBAUM,

Defendant.

ENDORSEMENT ORDER

Based on additional newly-discovered evidence concerning the personal finances of Jack Glasser, the government's principal witness, the defendant herein has renewed his motion for a new trial.

It is argued that the number of newly-discovered bank deposits indicates that numerous manufacturers were involved in the pay-off scheme rather than merely the six as claimed at trial and that therefore it would be quite unlikely that Glasser could have recalled the substance of the conversations he had with the defendant. Thus it is urged that if this evidence had been known by defendant at the time of trial, Glasser's testimony that he had received payments from the defendant would have been severely undermined. This contention, however, overlooks the fact that there was strong corroborative evidence that the defendant had, in fact, made these payments. A government witness testified that the defendant had admitted to having made the payments. Given this, it is

APPENDIX E—Endorsement Order of District Court Denying Second Motion for New Trial, United States v. *Schwartzbaum*

difficult to see how evidence that the scheme involved more manufacturers than originally believed would so shatter Glasser's credibility as to produce an acquittal at the trial or at a retrial. It is also alleged that the bank deposits constitute "solid evidence" that Glasser did not share any of the funds received with union officials and therefore no crime was committed. In this Court's judgment these deposits do not at all indicate that no union officials were involved in the scheme. Rather, given the small size of the industry and the added fact that the contract requirements created financial hardships which the manufacturers endeavored to avoid, it would be more reasonable to conclude that a pay-off scheme, involving as key persons in the arrangement union representatives, was not only in existence but was more widespread and far reaching than originally supposed.

The motion for a new trial is denied.

The alternative request for a hearing is also denied since the Court perceives no useful purpose to be attained thereby. The evidence adduced to support the central allegation concerning Glasser's finances is wholely documentary and has been made available to the defendant. The government's actions in connection with Glasser have been detailed. Finally, disclosure of the names of the other manufacturers purportedly involved in the scheme would not serve the public interest.

The motion for a new trial and the alternative application for a hearing are denied.

SO ORDERED.

Dated: New York, New York
June 5, 1975

LAWRENCE W. PIERCE
U. S. D. J.

APPENDIX F

Memorandum Opinion of District Court Denying Second Motion for New Trial, *United States* v. *Stofsky*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

73 Cr. 616

UNITED STATES OF AMERICA

—v.—

GEORGE STOFSKY, et al.,

Defendants.

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APPENDIX F—Memorandum Opinion of District Court Denying Second Motion for New Trial, United States v. *Stofsky*

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LAWRENCE W. PIERCE, D.J.

MEMORANDUM OPINION

Following jury verdicts of guilty on February 24, 1974 of various counts in an indictment the defendants herein moved on April 22, 1974 for a new trial based on newly-discovered evidence concerning the personal finances of the government's chief witness, Jack Glasser. More precisely, it was alleged that it had been discovered that during the years 1967 through 1970 Glasser and his wife had deposited over $57,000 in a series of frequent cash transactions in three separate New York banks. The defendants argued that this evidence demonstrated that Jack Glasser had committed perjury during the trial. Moreover, this was said to bolster the defense theory that while it appeared that Glasser had indeed accepted payments from various manufacturers no portion of these payments had in fact been turned over to the defendants. Rejecting the suggestion of prosecutorial misconduct, this Court held that the new evidence—the key to which was in defense counsel's hands during the trial—was insufficient to support the conclusion that a new trial had to be granted.

APPENDIX F—Memorandum Opinion of District Court Denying Second Motion for New Trial, United States v. *Stofsky*

Based on additional information, also concerning the Glassers' finances, the defendants have again moved for a new trial. It appears that the Glassers' deposits on various checking and savings accounts exceeded the amounts previously disclosed during the first motion for a new trial. The defendants also urge that a finding of prosecutorial misconduct be made since it appears that at least portions of this additional information were in the government's possession while the first new trial motion was being considered and that, on these grounds, a new trial be granted.

The Charge of Governmental Suppression

There is no question but that while the first new trial motion was *sub judice* the government had in its possession material which arguably was pertinent to the disposition of that motion. Indeed the government has acknowledged that at least some of these records had some "conceivable . . . significance." Affidavit in Opposition, 74 at 3. Nevertheless, the government unilaterally decided not to make a "piecemeal" disclosure of any of this material. While there has been no showing that the course adopted here was not taken in good faith—in fact, the opposite appears to be the case—the Court thinks that such a course clearly was highly inappropriate and that the failure to disclose the records—no matter how incomplete—constituted an error in judgment. See *United States* v. *Rosner*, Slip Op. Docket No. 74-2290 at 3269 (2d Cir. April 29, 1975). However, this Court does not agree with the position pressed by the defendants that the government's deliberate decision not to disclose the in-

complete records discovered after the end of the trial *ipso facto* warrants the application of a standard different from that used in ruling on the first motion for a new trial. The issue, rather, is whether there was any prejudice to the defendants. *United States* v. *Rosner*, *supra*. As the lower Court stated in *Rosner*: "Where post-trial suppression is alleged . . . the court's proper inquiry is into the effect of the disclosures on any new trial motion that has been made." *United States* v. *Rosner*, 72 Cr. 782, Slip Op. at 23 (S.D.N.Y. Aug. 15, 1974).

Here the defendants have totally failed even to allege any prejudice. The government *sua sponte* revealed all the information it had to the defendants and agreed to have the appellate process stayed pending the renewal of the new trial motion before this Court. The defendants have now had an opportunity to fully air all their contentions based on all the evidence available. In short, the Court finds that the government's failure to disclose the material in question, while regrettable, did not prejudice the defendants and accordingly this aspect of the motion is denied.

The New Evidence

As noted, the new evidence concerns the Glassers' personal finances. Whereas it appeared at the first new trial motion that the Glassers had made cash deposits from 1967-1970 amounting to nearly $58,000 now it appears that the deposits made, whether in cash or checks, totalled—as the government concedes—over $157,000 during the periods from January 1, 1962 through December 31, 1973. It is clear that Glasser's testimony at trial

concerning the source of his wealth, that is, that it was derived in the main from an inheritance left to his wife, was untruthful. As the Court concluded in its first opinion Glasser "has engaged in an effort to conceal information, and has given false, or deliberately misleading testimony with respect to the source of his savings." *United States* v. *Stofsky*, Slip Op. at 11-12. The material submitted to this Court on this new trial motion strongly reaffirms this conclusion but adds nothing substantively different to what was presented in the first motion for a new trial. In short, it is more of the same. Whether Glasser had secreted $58,000 or $157,000 dollars in his checking and savings accounts as such would in this Court's view have little significance at a new trial. Glasser's testimony concerning the source of his savings was directly impeached during the trial of these defendants and additional evidence on this point "would not have changed the quantum of the impeaching effect." *Stofsky, supra* at 22.

The Court is not unmindful of the defense theory that Glasser retained all the payments from the manufacturers and the further allegation that the amounts of the deposits demonstrate this fact. However, as the Court pointed out before in denying the first motion for a new trial, the size of the deposit do not at all necessarily establish that Glasser kept all the payments. A more reasonable and more damaging explanation would be that the extent of the scheme involving the defendants was far more widespread than previously known. Moreover, the defense theory was fully presented during the trial and apparently rejected by the jury.

APPENDIX F—Memorandum Opinion of District Court Denying Second Motion for New Trial, United States v. *Stofsky*

The motion for a new trial is hereby denied for the reasons stated herein and in this Court's Opinion dated June 12, 1974.[1]

So ORDERED.

Dated: New York, New York
June 4, 1975

LAWRENCE W. PIERCE
. U.S.D.J.

[1] The Court finds *United States* v. *Seijo*, Slip Op. Docket Nos. 74-2313, 74-2436 (2d Cir. April 23, 1975) inapposite. In *Seijo* the government had inadvertently failed to disclose evidence in its possession *during* the trial. Here the government discovered and first came into possession of the evidence *after* the trial. Thus the test used in *Seijo* is not applicable here.

APPENDIX G

Constitutional, Statutory and Regulatory Provisions Involved

FIFTH AMENDMENT:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

29 U.S.C. § 186:

29 U.S.C. § 186 provides, in pertinent part, as follows:

> "(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, advisor or consultant to any employer, or who acts in the interest of an employer to pay, lend or deliver, or agree to pay, lend or deliver, any money or other thing of value—
>
> "(1) to any representative of any of his employees who are employed in any industry affecting commerce;
>
> "(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce;
>
> • • • • •
>
> "(c) The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his

employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a Labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer;

"(d) Any person who wilfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

* * * * * *"

Rule 33, F.R.Cr.P.:

NEW TRIAL

The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.
As amended Feb. 28, 1966, eff. July 1, 1966.

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* Enacted June 23, 1974, c. 120, Title III, § 302, 61 Stat. 157, September 14, 1959, Pub. L. 86-257, Title V, § 505, 73 Stat. 537; as amended October 14, 1969, Pub. L. 91-86, 83 Stat. 133; August 15, 1973, Pub. L. 93-95, 87 Stat. 314.